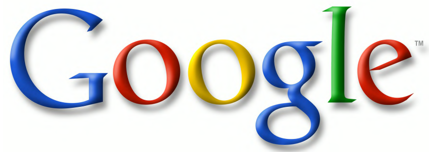

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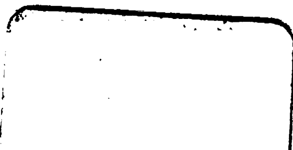

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REPORT OF CASES

DECIDED BY THE

SUPREME COURT

OF

MISSISSIPPI,

AT THE

NOVEMBER TERM, 1904.

Vol. 85.

REPORTED BY

T. A. McWILLIE.

NASHVILLE, TENN.:
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CASES ARGUED AND DECIDED

IN THE

SUPREME COURT OF MISSISSIPPI,

AT THE

NOVEMBER TERM, 1904.

WIRT ADAMS, STATE REVENUE AGENT, *v.* WILLIAM C. GRIFFIN.

CHANCERY PRACTICE. *Waste. School lands, sixteenth section.*

A bill in equity to recover for waste committed by defendant on sixteenth section school lands, averring simply that the school authorities had leased the land, that the original lessee had assigned the lease, and that defendant held under it, is demurrable for a failure to show the term of the lease, when, where, by whom and to whom it was made.

FROM the chancery court of, second district, Perry county.

HON. STONE DEAVOURS, Chancellor.

Adams, state revenue agent, appellant, was complainant, and Griffin, appellee, defendant in the court below. From a decree in defendant's favor the complainant appealed to the supreme court.

This was a suit brought by appellant against appellee, who was lessee of a sixteenth section in Perry county, for the purpose of recovering, for the use of the school fund, damages for cutting and boxing timber on said land. The substantial aver-

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ments of the bill are that on the ——— day of ———, 18—, acting for and on behalf of the county, and under the law, the authorities who were at that time charged with the leasing of said school land did on the date aforesaid lease the land described in the bill; that some time after the execution of said lease the lessee assigned said lease, and since that time it has been the property of various and sundry parties, becoming on the — day of ——, 18—, the property of defendant, W. C. Griffin; that some time after coming into possession of the lease said Griffin, without regard for the rights of the reversioners or remaindermen, but with view to his sole profit, did cut and remove the greater portion of the timber on said land; that said timber was not cut for the purpose of opening and clearing and cultivating the wild land, but was done for the purpose of converting said timber into lumber for the sole profit of respondent; that by reason of the cutting of the timber the land is now a barren waste, without sufficient timber to support the land were it placed in a state of cultivation; that said Griffin did box the timber, or allow it to be done, on said land, which did great damage to the timber—to wit, about $500; that the timber cut was of great value—to wit, $5,000; that complainant has no means of ascertaining the exact amount of the value of the timber cut and removed, nor the exact amount and value of the lumber into which it was converted, nor the exact amount and value of the turpentine and rosin removed, except by means of a discovery by respondent and the appointment of a commissioner by the court to take and state an account between the parties. The prayer of the bill was that complainant do have and recover of the defendant the value, with interest, of the timber and turpentine, etc., and for general relief. Defendant demurred to the bill, and the demurrer was sustained.

Mayes & Longstreet, for appellant.

Green & Green, for appellee.

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Opinion of the court.

CALHOON, J., delivered the opinion of the court.

The bill in this record avers that "on the ——— day of ———, 18—, the authorities who were at that time charged with the leasing of school lands did," acting in virtue of the laws, "lease the following described land" (describing it). There is no averment showing when, by whom, or to whom the lease was made, nor of the time for which it was made, nor of the terms of the instrument, nor whether it was in force or had expired when the acts complained of were done. It then proceeds to charge "that some time after the execution of this said lease the lessee named therein assigned said lease, and since that date it (the said lease) has been the property of various and sundry parties, becoming on the — day of ———, 18—, the property of defendant, W. C. Griffin;" and then it charges that "some time after becoming possessed of this said lease" he, regardless of the rights of the reversioners, but for his sole profit, "did cut and remove the greater portion of the timber on said land," whereby said land "is now left a barren waste," without timber enough to support it if ever cultivated, and that Griffin damaged the timber by boxing much of it for turpentine. The damage by the cutting is put at $5,000, and that by the boxing at $500. It is then averred that "complainant has no means of ascertaining the exact amount of the value of the timber removed, nor the exact amount and value of the lumber into which this timber was converted, nor the exact amount and value of the turpentine and rosin removed from said land, except by means of a discovery by respondent and the appointment of a commissioner to take and state the account," and that on final hearing decree be rendered that "complainant do have and recover" this value, with interest, and for general relief. This is substantially the whole bill, and the court sustained a demurrer to it, and dismissed it, but allowed sixty days to amend it. No amendment was made, but appeal was taken after the sixty-days leave expired.

Expressly declining to pass upon any other matter involved

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in this record, we hold that the demurrer was properly sustained to the bill, because it is too vague and indefinite to call for an answer.

Affirmed.

EX PARTE GEORGE HARRIS.

1. LANDLORD AND TENANT. *Laborer. Share-cropper. Violation of contract. Laws* 1900, *p.* 140, *ch.* 101. *Criminal law.*

   Laws 1900, p. 140, ch. 101, making it a misdemeanor for any laborer, renter, or share-cropper, who has contracted with another person in writing for a specified time, not exceeding one year, to leave his employer or the leased premises before the expiration of his contract, without the consent of his employer or landlord, and make a second contract without giving notice of the first one to the second party, is not violated by a person, under such first contract, who merely obtained money from his employer or landlord on pretenses of going to certain places on business, and who left the premises of his employer or landlord and did not return.

2. SAME. *Habeas corpus. Discharge of relator. Code* 1892, § 2228.

   A relator who has been arrested upon an affidavit, purporting to be predicated of said statute, which charges no offense, should be discharged upon *habeas corpus*, notwithstanding Code 1892, § 2228, providing that a person shall not be discharged on *habeas corpus* because of invalid proceedings if he ought to be held for any crime alleged against him, where it is not made manifest that he has been guilty of some crime.

FROM the circuit court of Warren county.

HON. GEORGE ANDERSON, Judge.

Application by George Harris for a writ of *habeas corpus*. From a judgment remanding relator to custody he appealed to the supreme court.

An affidavit was made against relator, Harris, before a justice of the peace in Washington county under an act of

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the legislature approved March 12, 1900 (Laws 1900, p. 140, ch. 101), charging him with obtaining money under false pretenses, and willfully violating his contract with affiant by leaving his crop before the expiration of his contract. Relator was arrested in Warren county, and placed in jail, and sued out the writ of *habeas corpus* in this case. The affidavit was made by one Goldfarb, and was as follows: "S. P. Goldfarb makes oath that on or about the 25th day of August, 1904, one George Harris did willfully violate his contract with affiant by leaving his crop before the expiration of his said contract, and did obtain money under false pretenses, in violation of the statute in that behalf." On the hearing Goldfarb appeared and testified as follows: "I paid $54 to get George Harris on my plantation. He contracted to work thirty acres of land on shares. I was to furnish him supplies, which I did to the amount of $225. About the middle of July he got $3.50 from me, saying he was going to Vicksburg to get attention. He stayed away about three weeks, and returned and told me he had been summoned to Washington, D. C., to testify as a witness. He said he was bound to go, and I loaned him $18.50. He did not go on the train that day. I have not seen him since, till today in court. I know that he did not go to Washington. He could have gone there and back in five days."

McLaurin & Thames, for appellant.

The act of March 12, 1900, is clearly unconstitutional and void, because it is in violation of sec. 15, art. 3, of the constitution of the state of Mississippi, in that it is clearly intended to force citizens into involuntary servitude. Such act is also repugnant to the constitution of the United States, amendment 14, providing that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, as restricting the right to contract.

A conviction under an unconstitutional statute is void, and

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a prisoner may be discharged from custody under it by *habeas corpus.* 15 Am. & Eng. Ency. Law, 169; 58 Am. St. Rep., 576; 3 Am. St. Rep., 901; 39 Tex., 705; 16 Mo. App., 14.

If the writ would lie after a conviction under an unconstitutional statute to release the party from custody, why would it not lie before conviction? It undoubtedly would, and we refer to the case of *Toney* v. *State* (Ala.), 37 South. Rep., 332.

As for the charge of false pretense, it can be readily seen that the statute has not been complied with in attempting to charge such an offense.

J. N. Flowers, assistant attorney-general, for the state.

It was the duty of the trial judge, under Code 1892, § 2228, to remand relator to the custody of the officer without any regard to the sufficiency of the affidavit, since it appeared that he might be guilty of some crime in Washington county. The trial judge passed upon these facts and decided that relator was probably guilty of some crime and properly left him in the custody of the officers.

TRULY, J., delivered the opinion of the court.

Relator was entitled to his discharge. The affidavit by virtue of which he was detained charged no offense known to our law. Sec. 2228, Code 1892, does not affect this conclusion, for upon the investigation of the facts by the circuit judge it did not appear "that he [the relator] ought to be held for any crime alleged against him." Accepting the testimony for the state as true, relator was not proven to have committed any crime. Under this view of the case, it is not necessary to decide the constitutional question suggested.

The judgment of the circuit court is reversed, and the defendant discharged.

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YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY v. GEORGIA HOME INSURANCE COMPANY.

COMMON CARRIER. ***Passenger's baggage. Business papers. Principal and agent.***

Papers relating to the business of his principal, placed by an agent in his trunk and carried solely for the purposes of his principal's business, are not baggage, and in the absence of the consent of a common carrier of passengers to accept them as baggage, there being no custom to do so, damages cannot be recovered either for loss, or delay in the carriage, of such papers.

FROM the circuit court of Warren county.

HON. GEORGE ANDERSON, Judge.

Dana Blackmar, suing for the use of the Georgia Home Insurance Company, appellee, was plaintiff in the court below; the Yazoo & Mississippi Valley Railroad Company, appellant, was defendant there. From a judgment in plaintiff's favor the defendant appealed to the supreme court.

Blackmar was the special agent and inspector of the Georgia Home Insurance Company, and on July 1, 1903, purchased a ticket over the Yazoo & Mississippi Valley Railroad from Natchez, Miss., to Baton Rouge, La., both points being on said railroad. He checked his trunk to Baton Rouge. The trunk contained his wearing apparel and all the papers pertaining to his business. The trunk was not delivered at Baton Rouge promptly, and Blackmar left there with instructions to the railroad agent at that point to send the trunk to New Orleans. The trunk was delayed, and was not delivered to Blackmar in New Orleans until July 11th. Plaintiff claimed that the delay in the delivery of the trunk caused Blackmar to lose six days' time, and to pay a hotel bill for six days, and to pay $2 for telegrams in his effort to recover the trunk. The Georgia Home Insurance Company brought this suit in a justice of the peace's court in the name of said Blackmar, for its use, to

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recover $10 per day for the six days lost by Blackmar, this being the amount paid him as salary; the sum of $36, hotel bills, which it had to pay for Blackmar; and other expenses, $2; and recovered a judgment for the amount sued for—in all, $98. Defendant appealed to the circuit court, and plaintiff recovered a judgment there for the same amount. Defendant's motion for a new trial was overruled.

Mayes & Longstreet, and *J. M. Dickinson,* for appellant.

The extensive and valuable insurance papers, which presumably were copies of policies, proofs of loss, reports and estimates, were in no sense the property or personal effects of Dana Blackmar, the passenger, and were in no sense "baggage." The definition of "baggage" given in the case of *Mississippi, etc., R. R. Co.* v. *Kennedy,* 41 Miss., 678, is a proper and sufficient definition, and one that is today the definition supported by the great weight of authority.

The agreement of facts expressly states: "It is further agreed that neither the agent who sold the ticket to said Blackmar, nor the baggage man by whom said trunk was checked, nor any other agent or employe of defendant, had any knowledge or reason to believe that said Blackmar was such agent or employe of the Georgia Home Insurance Company. Nor did said baggage man, nor any other employe of defendant, have any knowledge or information as to the contents of said trunk."

Here is an express statement that the company did not know, and did not have any reason to know or to infer from any statement or fact connected with the purchase of the ticket or the checking of the baggage, that the small trunk contained many papers belonging to the insurance company, and which were of great value and indispensable to said company in the prosecution of the said business of the adjustment of its losses in the southern territory in this section.

In the growth of the law the courts, in the definition of the

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term "baggage," have held that in some instances railroad companies are liable for the loss of some articles not strictly the personal effects of the passenger, but merchandise belonging to his principal, such as the samples of a commercial traveler, but they have based these decisions on the idea that the railroad companies, according to the practice of carrying drummers and their trunks, and by reason of their habit to charge excess baggage rates on excess of such baggage, have nominally consented to and accepted such shipments, and that by the usage in connection with such business they will not be permitted to say that the articles were merchandise, and not the personal effects of the drummer.

The lower court evidently applied this principle to the facts of this case, but how very different is the case itself! Here a traveler, with nothing about him or his transaction with the railway company to put the carrier on notice, tenders a trunk containing his own personal belongings, but which also contains a large quantity of valuable documents belonging to his employer, with no notice to the company, and nothing to charge them with knowledge, nor to estop them from any defense!

In 6 Cyc., 69, the rules which apply in defining "baggage," and the many authorities of the courts in relation thereto, are given. This most excellent authority states: "If merchandise is checked under the form of baggage or mingled with articles of baggage without the carrier's knowledge, he is not liable therefor." And citing many authorities.

Our own court, in the case of *Mississippi, etc., R. R. Co.* v. *Kennedy, supra,* declares that passengers offering baggage for shipment shall not subject the carrier to unknown hazards, and that it is the duty, impliedly, of the owner of the baggage to make known its contents when they are different from the ordinary and usual personal effects or of any special importance, and that unless such special information is given, the withholding of the information is such a concealment as defrauds the carrier and exonerates him from liability.

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Again, in *Michigan Central R. R. Co.* v. *Carron,* 24 Am. St. Rep., 248, the court says: "A traveler who presents to a carrier of passengers, as his baggage, an ordinary trunk or valise, without describing its contents, impliedly represents that it contains only wearing apparel, and articles such as are necessary for his comfort and convenience on the journey." See also *Davis* v. *R. R. Co.,* 74 Am. Dec., 151; *Doyle* v. *Kiser,* 6 Ind., 242.

McLaurin, Armistead & Brien, for appellee.

This is a suit for damages sustained by appellee on a breach of contract because of the loss of time enforced on appellee's agent by reason of the inexcusable delay of appellant in delivering his trunk. It is not a suit for the value of anything lost called baggage, whether properly so called or not; it is a suit for damages for the value of the use of certain papers during their delay. *G. C. & S. F. R. R. Co.* v. *Vancil,* 21 S. W. Rep., 303; *T. & P. R. R. Co.* v. *Douglas,* 30 S. W. Rep., 488.

In 4 Elliot on Railroads, 2631, it is stated: "Damages may be recovered in a proper case for delay as well as for loss or injury to baggage." In 3 Am. & Eng. Ency. Law, 584, 585, it is stated: "Expenses necessitated by loss or delay, as when he is subject to great delay in his journey, ... are within the measure of damages."

Our court designates the various articles as baggage which a passenger may carry along for his amusement, and it may be surely deduced that a passenger may in his trunk carry papers for his business purposes. It is further said in *Mississippi, etc., R. R. Co.* v. *Kennedy,* 41 Miss., 679: "The usual contract of a carrier of passengers includes an undertaking to receive and transport their baggage, though nothing be said about it, and if it be lost, even without the fault of the carrier, he is responsible. But this implied undertaking has never been extended beyond ordinary baggage, the value of which when lost is all that can be recovered, the action not being in tort, but for the breach of contract. The actual damage arising

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from the breach is the measure of recovery in this form of action. *New Orleans, etc., R. R. Co.* v. *Moore,* 40 Miss., 39."

Now, if Blackmar, appellee's agent, had a right to carry these papers of his master in his trunk for his business purposes, we submit that there is as much an implied contract on the part of the carrier, appellant here, to carry and deliver promptly this trunk containing these papers as there would be not to lose or destroy the articles themselves. For the loss of articles the measure of damages would be the actual value; for the delay the measure would be the actual cost of the delay.

WHITFIELD, C. J., delivered the opinion of the court.

Perhaps the definition given by Chief Justice Cockburn in *Macrow* v. *Great Western Railway Co.,* L. R., 6 (Q. B., 622), is as accurate a definition of "baggage" as can be found. That definition is this: "We hold the true rule to be that whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal baggage. This would include not only all articles of apparel, whether for use or ornament, but also the gun case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveler, and the taking of which has arisen from the fact of his journeying. On the other hand, the term 'ordinary luggage' being thus confined to that which is personal to the passenger, and carried for his use or convenience, it follows that what is carried for the purposes of business, such as merchandise or the like, or for larger or ulterior purposes, such as articles of furniture or household goods, would not come within the description of ordinary luggage, unless accepted as such by the carrier." The sheets of paper constituting the

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memoranda of the agent, Mr. Blackmar, are manifestly papers relating exclusively to the business of his company. We are unable to concur in the view that they can in any proper or legal sense fall within the legal definition of baggage. They are not such things as were for his personal use or his personal convenience. Their use was in no sense personal to the traveler. On the contrary, they were carried, distinctly and exclusively, "for the purposes of business," to quote the definition of Chief Justice Cockburn. They were not legally or properly put as baggage in his trunk, and, not being properly put there as baggage, no damages can be recovered for delay in their shipment in the trunk. It would therefore make no difference whether the suit was one brought for loss of these papers as constituting properly a part of the baggage of Mr. Blackmar or was one "for damages sustained by appellee on a breach of contract, because of the loss of time enforced on appellee's agent by reason of the inexcusable delay of appellant in delivering his trunk." Counsel for appellee say that the suit is of the latter character, and that learned counsel for appellant misconceive it as a suit of the former kind. But whether one or the other, if the memoranda are not properly baggage, nothing can be recovered as constituting the value of the memoranda, nor can anything be recovered as damages for delay in shipping. It must be said that the record is very vague and indefinite in giving an exact description of these memoranda, but it seems clear that the papers were the papers of the master, the insurance company, and not of this agent, and that they were not designed for his personal use or convenience or comfort, but strictly and distinctly as business papers in the transaction of the business of his master. We think it is clear, on a careful reading of the authorities cited on both sides, that no papers of the latter kind are in any proper or just sense baggage. And we understand this to be the doctrine as declared in *Miss. Central R. R.* v. *Kennedy*, 41 Miss., 678. The railroad knew nothing about these memo-

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randa being in the trunk, and it is not a case where the railroad company has consented to receive or accepted these memoranda as baggage knowingly, or in accordance with any usage or custom of the railroad. To hold these papers and documents—so important that their delay for a single day might involve a loss of from ten to fifty thousand dollars to the insurance company; papers and documents concededly the property of the company, and not of the agent; papers and documents which relate exclusively to the conduct of the business of the company, and which are in no way needed for the personal comfort, convenience, or use of the agent—constitute baggage, would be to expand the definition of baggage beyond anything warranted by any well-considered case. We have carefully considered the two strongest cases cited by learned counsel for appellee—*Staub* v. *Kendrick* (Ind. Sup.), 23 N. E., 79 (6 L. R. A., 619), and *Gleason* v. *Goodrich Transportation Co.* (Wis.), 14 Am. St. Rep., 716—but we do not think either in point here. In the Gleason case the book which contained the prices of all the component parts of Sheffield goods was the personal property of the agent, the suit there being for the value of the book specially as such; and so in the other case the suit, again, was for the value of an illustrated catalogue prepared by the agent himself, being his own personal property, estimated to be worth $50. These cases are much the strongest cited by learned counsel for appellee, but we think the decisive weight of authority, as well as these cases properly considered, would exclude memoranda, such as those involved in this suit, from the category of personal baggage. See *Mauritz* v. *N. Y.* (C. C.), 23 Fed., 765, and, for a valuable discussion, *Choctaw, etc.,* v. *Zwirtz* (Okl.), 73 Pac., 941.

It follows that the judgment must be reversed and the case remanded for a new trial. Reversed and remanded.

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CHAS. C. COFFEE v. SAMUEL S. COLEMAN ET AL.

TAX TITLES. ***Confirmation. Pleadings. Presumption.***

Where a bill for confirmation of a tax title alleges a valid sale of the land for taxes and exhibits as part thereof a tax deed in statutory form, which under the law is *prima facie* evidence of the validity of the assessment and sale, it cannot be assumed on demurrer that the assessment was made under the unconstitutional act of 1888 (Laws, p. 24) because the tax deed recites that the sale was for the taxes assessed for the year 1890.

FROM the chancery court of Lauderdale county.
HON. STONE DEAVOURS, Chancellor.

F. V. Brahan, for the appellant.

Williamson & Gilbert, for the appellees.

CALHOON, J., delivered the opinion of the court.

The bill is to confirm a tax title, is good on its face, and exhibits, as part of it, two conveyances from the tax collector which are in statutory form, and are by law *prima facie* evidence of the validity of the assessment and sale. Code 1892, § § 1806, 3817. We are not favored with any brief for appellee, but suppose the demurrer was argued and sustained on the ground that, because the tax conveyances recite that the assessment was for the year 1890, the court had to assume that it was made under the act of March 8, 1888 (Laws 1888, p. 24, ch. 9), commonly known as the "Madison act," which was declared by this court to be absolutely void for unconstitutionality in the case of *Hawkins* v. *Mangum,* 78 Miss., 97 (28 South., 872). This assumption is not necessarily to be made on a demurrer to a bill charging a valid assessment under the recitals in the conveyances before us. It may be that the void act was ignored, and that the county authorities had a valid assessment made under the then existing valid general

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law. *Butts* v. *Ricks*, 82 Miss., 533 (34 South., 354). If it shall develop that the assessment and sale were under the Madison act, then, of course, the sale was void, and complainant below must fail in his suit.

Reversed, demurrer overruled, and case remanded, with sixty days to appellee to answer after mandate filed below.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* THOMAS HARRIS,

AND

THOMAS HARRIS *v.* GULF & SHIP ISLAND RAILROAD CO.

1. PARTIES. *Joint defendants. Separable controversies. Federal jurisdiction. Removal to federal court.*

   In a suit against two defendants, one a resident and the other a non-resident of the state, in the absence of a showing that the resident defendant was joined merely for the purpose of defeating federal jurisdiction:

   (*a*) The question whether a separable controversy exists between the plaintiff and the non-resident defendant, and the right of said defendant, predicated thereof, to remove the cause to the federal court, will be determined from the averments of the declaration; and

   (*b*) If the declaration fails to show a separable controversy, the granting, at the close of the evidence, of a peremptory instruction to the jury for the resident defendant does not entitle the non-resident then to remove the cause to the federal court.

2. SAME. *Concrete case.*

   A declaration against two railroad companies alleging that by contract between defendants one of them had the right to use the switches and yard tracks of the other, subject to the control of the latter's yardmaster, that plaintiff, an employe of the former, was injured by the negligence of his employer's conductor and of the yardmaster of the other company in charge of the switches and tracks, does not allege a separate controversy between plaintiff and either of said companies.

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Statement of the case.

3. MASTER AND SERVANT. *Injury to servant. Railroads. Independent companies.*

The fact that the relation of master and servant existed between the plaintiff and one of two railroad companies defendants, and that said companies are independent corporations, will not prevent plaintiff from maintaining a joint action against them.

FROM the circuit court of, first district, Hinds county.

HON. DAVID M. MILLER, Judge.

Thomas Harris, appellee as against the Illinois Central Railroad Company, and appellant as against the Gulf & Ship Island Railroad Company, was the plaintiff, and both of said railroad companies were defendants in the court below. From a judgment in plaintiff's favor against the Illinois Central Railroad Company that defendant appealed to the supreme court. Harris also appealed from a judgment in favor of the Gulf & Ship Island Railroad Company. Both appeals were heard and decided together.

On the return-day of the summons the Illinois Central Railroad Company made application to remove the case into the United States circuit court in and for the southern district of Mississippi at Jackson, on the ground that said company is an Illinois corporation, and the controversy between it and plaintiff was separable from the controversy between the plaintiff and the Gulf & Ship Island Railroad Company, which application was overruled by the court below. The Illinois Central Railroad Company and the Gulf & Ship Island Railroad Company filed separate pleas. A trial was entered upon, and at the conclusion of the testimony the court gave a peremptory instruction in favor of the Gulf & Ship Island Railroad Company, to which plaintiff excepted. The case as between plaintiff and the other defendant was submitted to the jury, and a verdict was rendered in plaintiff's favor against the Illinois Central Railroad Company for $750.

The plaintiff prosecuted an appeal from the judgment discharging the Gulf & Ship Island Railroad Company from the suit.

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Mayes & Longstreet, and *J. M. Dickinson*, for appellant, Illinois Central Railroad Company.

Under the condition of the plaintiff's case, as made in his declaration, there was clearly a separable controversy, and the case was removable to the Federal court on the application of the Illinois Central Railroad Company under the act of congress in such case provided.

It is true that the supreme court of the United States has decided in the Dickson case, 179 U. S., 131, that where the plaintiff brings a joint suit against a corporation and its employes for an injury caused by the negligence or misfeasance of the corporation's employes, there is no separable controversy; but this case does not fall within that category. Here two independent and disconnected corporations are sued in the same action, and the liability charged against one is the negligence of one person alleged to be its yardmaster, and the liability charged against the second is the negligence of a different person alleged to be its conductor.

With the Gulf & Ship Island Railroad, therefore, the case necessarily led to an issue on the conductor's negligence. With the Illinois Central, on the other hand, the trial necessarily led to an issue on the yardmaster's negligence.

The controversy, therefore, was not only separable, but of its very nature could be nothing else. To say that the controversy was not separable is absurd, because the ultimate issue of this case was a separation of it; and the court on the trial, in advance of the argument to the jury, gave a peremptory instruction in behalf of the Gulf & Ship Island Company as to the negligence charged against its conductor, and sent the Illinois Central to trial before the jury as to the negligence charged against its yardmaster.

Persons are not jointly liable for tort merely because they have some connection with it, even if it be such as to give a cause of action against them. There must be some coöperation in fact. *Schafer* v. *Union Brick Co.*, 128 Fed. Rep., 97,

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101, and authorities cited; *McIntyre* v. *Southern Ry. Co.,* 131 Fed. Rep., 985.

But in this case it was impossible that there could be a common cause of action against both of these defendants, because on the face of the declaration it was necessarily true that the primary cause of the plaintiff's injury was either the negligence of the conductor employed by the Gulf & Ship Island Company or else the negligence of the yardmaster employed by the Illinois Central Company.

Now the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal. *Railroad Co.* v. *Wangelin,* 132 U. S., 599; *Schafer* v. *Union Brick Co., supra.*

And this declaration presented a case in which, if the injury by any negligence be shown, the inevitable result would be, as this record shows it was in fact, a controversy between the two defendants as to which was responsible. *Stanbrough* v. *Cook,* 3 L. R. A., 400.

We now submit our second point, which is that if we are mistaken in the foregoing position, and the state court rightfully retained jurisdiction for the reason that the action was joint, and not separable, then when the plaintiff was cast in his suit against the Gulf & Ship Island Company by the court's peremptory instruction, the co-defendant, the Illinois Central Railroad Company, was also entitled to a judgment; and the court should have sustained the motion of the Illinois Central for a peremptory instruction; or else it should have sustained the motion of the Illinois Central for a judgment *non obstante.*

The predicate had been properly laid. First, there had been an application for removal on the ground of separable controversy, which application was overruled; hence, secondly, on the failure of the plaintiff to maintain its joint action against the Gulf & Ship Island, the Illinois Central immediately moved

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for a peremptory instruction on that ground, as set forth in the record.

It certainly cannot be contended with any logic or justice that the plaintiff can so frame his declaration as, by the form of it, to deprive a defendant, otherwise entitled to removal, of his right to remove to the Federal court, and then, having failed to recover against the co-defendant so wrongfully joined, to persevere in his suit to the end and recover a separate judgment against the one whose right of removal had been so evaded. That is to nullify the act of congress by an artifice; and whatever might have been the common-law rule in regard to several recoveries against either one or the other of joint defendants, when the conditions are such that the plaintiff, by his action, has cut out a party from a substantial right to which he is entitled (as the right of a removal to the Federal court), he must submit to be defeated unless he maintains his joint action as a joint action, and shows that he is entitled to a joint recovery. *Weist* v. *Philadelphia,* 58 L. R. A., 666.

Our third point is one which goes to the merits of the case, and it is as follows: The declaration alleged, as shown before, that, by an agreement between the two railroad companies, the Gulf & Ship Island Railroad Company was using the tracks in the yard of the Illinois Central Railroad Company; and it alleges as the gravamen of the cause against the Illinois Central that the plaintiff was injured by the negligence of the Illinois Central Company's yardmaster. The fact is, we contend, as shown by the proof in the case, that, *pro hac vice,* the yardmaster, under the agreement between the two companies alluded to in the declaration, must be taken to have been yardmaster of the Gulf & Ship Island Company. As to the plaintiff, under the facts of the case, who was a Gulf & Ship Island employe, the Gulf & Ship Island Company was still liable, whether he was injured by the negligence of the conductor or the yardmaster, and the Gulf & Ship Island Company alone.

Granting that the yardmaster was in fault, under the agree-

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ment alleged in the declaration and produced in court, the yardmaster in his supervision and direction of Gulf & Ship Island trains and employes was not the yardmaster of the Illinois Central Company, but was the yardmaster of the Gulf & Ship Island Company. In brief, if it be true that he was negligent in the management of this particular train, being the Gulf & Ship Island train, such train being where it was under and by virtue of the agreement which was called for by the plaintiff himself, the yardmaster was acting as a Gulf & Ship Island Company servant; and the court erred in its construction of the contract and the relations between the parties, and in allowing judgment to go against the Illinois Central instead of sending the case to the jury to be heard as against the Gulf & Ship Island Company.

Brame & Brame, for Thomas Harris, appellee in the appeal of the Illinois Central Railroad Company, and appellant as against the Gulf & Ship Island Railroad Company.

On the appeal by the Illinois Central Railroad Company only two points are involved: (1) The action of the court in refusing the application to remove the cause to the Federal court. (2) The Illinois Central Railroad Company's claim that it is not liable.

The case was not removable to the Federal court. There was no separable controversy. The very case cited by opposite counsel, *Railroad Co.* v. *Dixon,* 179 U. S., 131 (21 Sup. Ct., 67; 45 L. ed., 121), holds the contrary. See also *Winston's Administrator* v. *I. C. R. R. Co.* (Ky.), 65 S. W., 13 (55 L. R. A., 603); *Powers* v. *Railroad Co.,* 169 U. S., 92 (18 Sup. Ct., 264; 42 L. ed., 673); *Howe* v. *Railroad Co.* (Wash.), 70 Pac., 1100 (60 L. R. A., 949). This covers our case entirely.

If plaintiff has a cause of action against several defendants which is joint, or joint and several, and it is declared on jointly by plaintiff, defendants cannot, by tendering separate issues in

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their answers, create separable controversies, so as to authorize a removal. *Stanbrough* v. *Cook* (C. C.), 38 Fed. Rep., 369 (3 L. R. A., 400, and authorities cited); *Crisler* v. *Ott,* 72 Miss., 166 (16 South., 416).

Counsel's contention that where plaintiff sues two defendants jointly as wrongdoers, and the court gives a peremptory instruction as to one over plaintiff's objection, the case should be dismissed as to the other, is unsound. This was not the rule at common law, and certainly is not under § 751, Code 1892. Even in actions *ex contractu* our statute abolishes distinction in remedies between joint and joint and several obligations. Code 1892, § 2353; *Steen* v. *Finley,* 25 Miss., 535.

The judgment against the Illinois Central Railroad Company is correct, and it will not be reversed merely because it should have been, as well, against the other defendant. Code 1892, § 4378.

McWillie & Thompson, E. J. Bowers, and *James H. Neville,* for the Gulf & Ship Island Railroad Company, appellee in Harris' appeal.

When we come to a consideration of the facts of the case, the propriety of giving the peremptory instruction for the Gulf & Ship Island Railroad Company is, we think, perfectly manifest. It was shown by the plaintiff himself and all the witnesses —

(a) That the Gulf & Ship Island tracks terminate several hundred yards south of the place where plaintiff was injured.

(b) That the railroad yards where he was injured belonged to the Illinois Central Railroad Company.

(c) That these yards were under the control and management of an Illinois Central officer, the yardmaster, whose duty it was to see that no car or other obstruction was permitted to block the entrance to tracks.

(d) That the custom between the two railroads was for the Gulf & Ship Island engines and cars, when placed in the Illi-

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nois Central yards, to be stationed on whatever track was designated by the Illinois Central yardmaster, and his directions were always followed if he were present; and the Gulf & Ship Island employes exercised no discretion in the matter save when they found no Illinois Central officer at the yards to direct them.

(e) That on the occasion in question, when the Gulf & Ship Island train upon which plaintiff claimed to have been an employe, reached that company's yard (considerably distant south from the Illinois Central yards), the train was disposed of there, the conductor directing plaintiff and his fellow-servants in charge of the engine and caboose "to back up in the yard (I. C. yard) and take the caboose up in the yard and set it out." The conductor remained at the Gulf & Ship Island office, a long way south of the Illinois Central yard where plaintiff was injured.

(f) When plaintiff and his fellow-servants reached the Illinois Central yards they were directed, according to custom, by the Illinois Central yardmaster to go on the track designated as No. 3, and they undertook to do so, not because of the conductor's direction—he did not designate any track—but because of the order from the Illinois Central yardmaster, and plaintiff received his injuries while attempting to follow the yardmaster's order.

Surely the conductor was not guilty of negligence in directing the crew "to take the caboose up in the yard and set it out," this being the customary disposition made of cabooses when trains reached Jackson. He was under no duty to go along with the crew and protect them from collisions. He did not know that track No. 3 was obstructed. He did not order them to go on that track. He did have a right to expect that the Illinois Central yardmaster would give the crew directions when they reached the yards, but he did not know what track the yardmaster would order used on the occasion in question. It must be remembered, too, that the declaration shows that

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the flat car protruded over track No. 3 was an Illinois Central car, and it, as well as the testimony, shows that the Illinois Central yardmaster controlled the yards and the movement and locating of cars therein. If the accident had happened on a Gulf & Ship Island track, that company would not be liable to plaintiff. Suppose an Illinois Central car was placed, through the negligence of an Illinois Central yardmaster, so near a Gulf & Ship Island track as to prevent the passage of a train of the last named company, and the officers and agents of that company did not know it, and had not had opportunity to be informed of it, and one of its employes was injured because thereof, who would be liable? The Gulf & Ship Island Railroad Company would not be liable any more than it would be liable to an employe for an injury arising from the act of some malicious person in obstructing the track at night two minutes before the arrival of its train.

The court will observe that a most flagrant error was committed against the Gulf & Ship Island Railroad Company in permitting what was called a printed copy of a contract between the two defendants to be read in evidence over its objection.

The plaintiff's having withdrawn his objection to the copy did not make it admissible as against the objecting defendant, the Gulf & Ship Island Railroad Company. If the court allowed such incompetent evidence to be introduced on the idea that it was competent between the defendant offering it and the plaintiff, it was under duty to protect the defendant against whom it was clearly incompetent from its effects. Had the case against our client been passed upon by the jury, the court could not rightfully have refused us an instruction that the contract was not evidence against our client. Therefore, when the court acted upon the peremptory instruction asked by us, it could not rightfully consider the contract as evidence against the Gulf & Ship Island Railroad Company.

Our view of the law of evidence applicable to the subject is this: In an action for tort brought against two or more defend-

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ants where evidence is offered which is incompetent as against one of the defendants, but competent as between the other parties, it may be admissible, but the court should to the full extent of its power protect the defendant against whom it is incompetent from its effect, and in case such defendant applies for a peremptory instruction in his favor, the court should not consider the incompetent evidence in determining whether to give or refuse the instruction. *Whitney* v. *Farris,* 10 Johnson, 66.

We have been unable to find anything in the contract, an asserted printed copy of which was offered in evidence, which tends to make out a case for the plaintiff against the Gulf & Ship Island Railroad Company; but if any such thing can be pointed out, it cannot be availed of in this case without violating the rights of that company to be held liable, if at all, only upon competent evidence of its liability.

That is not all. The custom and practical operation of affairs between the two railroad companies, as shown by the evidence, contradicts any construction of the copy of the contract which would impose liability in this case on the Gulf & Ship Island Railroad Company.

If there is any liability to plaintiff, it grew out of the negligence of the Illinois Central yardmaster. The testimony all shows that he was not the agent of the Gulf & Ship Island Railroad Company, but of the Illinois Central Railroad Company. There is nothing in the copy of the contract which made him the Gulf & Ship Island Railroad Company's agent.

Argued orally by *Edward Mayes,* for the Illinois Central Railroad Company; by *L. Brame,* for Thomas Harris; and by *R. H. Thompson,* for the Gulf & Ship Island Railroad Company.

CALHOON, J., delivered the opinion of the court.

The declaration in this case sets up a claim by Harris for damages for personal injuries against the appellant, the Illinois

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Central Railroad Company, and the Gulf & Ship Island Railroad Company, appellee in Harris' appeal. It avers that by an arrangement between the two companies, existing for a long time, the Gulf & Ship Island used the spur tracks and switches in the yards of the Illinois Central, which yards were under the control of the Illinois Central, through its yardmaster, who controlled and directed the movements of the locomotives and cars of both companies in those yards, and that it was the duty of both companies to use proper care in switching to prevent harm to employes; that a failure to observe such care caused injury to Harris, the facts being that Harris was a brakeman of the Gulf & Ship Island Railroad, and working as such on the caboose of a freight train. The locomotive which pulled the train into the city of Jackson went with it onto the "Y" of its company, and, according to the custom, under the arrangement, it backed the caboose on a sidetrack of the Illinois Central under the order of the Gulf & Ship Island conductor to put it "on this track, or on one of the switch tracks," and the yardmaster of the Illinois Central ordered the caboose to be placed on track No. 3, and, in so placing it, it encountered the corner of a flat car of the Illinois Central negligently left protruding over the way, but not visible to the brakeman, Harris, and by which collision he was badly hurt. The switch light indicated a clear way, and it was, the declaration avers, "negligent and careless on the part both of the said [Gulf & Ship Island] conductor and the said [Illinois Central] yardmaster to order plaintiff, unwarned, into this position of peril." This declaration, of which the foregoing is the substance, was confronted with a petition for removal to the Federal court by the Illinois Central Railroad Company on the ground that it is a nonresident corporation, and that the controversy as to it is separable from that between plaintiff and its co-defendant, the Gulf & Ship Island Railroad Company. This petition was refused, and this is assigned as error. We affirm this ruling on the face of the declaration, which must determine the matter,

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certainly in the absence of any pretense of a scheme to defeat the Federal jurisdiction. If the plaintiff had, in the course of the trial, discontinued his action as to the resident defendant, and this petition for removal had been then interposed, a different question would be before us. But it cannot alter the case that, after the *bona fide* prosecution to an end, the court saw fit, on the evidence, to give a peremptory instruction in favor of the home company. That may have resulted from some defect in the evidence as to the resident defendant. It possibly, if not probably, resulted, in the case before us, from the nonproduction by defendant, Illinois Central Railroad Company, of the original written joint traffic arrangement between it and the Gulf & Ship Island Railroad Company. The consent of the plaintiff that a copy of it be read could not affect the defendant, the Gulf & Ship Island, which objected; and the agreement of plaintiff with one co-defendant to the introduction of incompetent testimony cannot oust the jurisdiction of the cause. We think the right clear to bring a joint action in tort against wrongdoers, and do not think this right affected by the existence or nonexistence of the relation of master and servant between some of them and the actors in the tort, or because defendants were independent corporations, as in the present case.

We rely upon the cases cited in the brief of counsel for appellee in support of our conclusions, and here approve a quotation from the opinion in *Powers* v. *Railroad Company,* 169 U. S., 97, which is: "It is well settled that an action of tort, which might have been brought against many persons, or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the circuit court of the United States, even if they file separate answers and set up different defenses from the other defendants and allege that they are not jointly liable with them and that their own controversy with the plaintiff is a separate one; for, as the

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court has often said, a defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings."

After careful examination of the record, we find no error in it.

Affirmed on both appeals, at costs of the Illinois Central Railroad Company.

JOHN BROWN v. STATE OF MISSISSIPPI.

CRIMINAL LAW. *Burglary. Corpus delicti. Sufficiency of proof. Confession.*

Upon the trial of a defendant, indicted for burglary, testimony that the outer door of the house had been broken and the cash drawer therein opened, even in the absence of direct evidence that anything had been stolen, is a sufficient showing of an intent to steal and of the *corpus delicti* to authorize the admission in evidence of defendant's confession.

FROM the circuit court of Warren county.

HON. GEORGE ANDERSON, Judge.

Brown, the appellant, was indicted, tried, and convicted of burglary, and appealed to the supreme court. The opinion states the facts upon which the case was decided.

T. D. Marshall, for appellant.

This is a charge of burglary. The *corpus delicti* in such cases consists of two elements: (a) The breaking in, and (b)

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the intention of committing a crime. A breaking in without intending to commit a crime is not burglary. A crime committed in a dwelling house or store, or an entering into a dwelling house or store with the intention of committing a crime, without a breaking, is not burglary. To prove the crime the state must prove, therefore, not only a breaking, but the intention to commit or the commission of a specific crime specifically charged.

While the breaking is amply proved, the intention to commit a crime is not proved except by the confession of the prisoner, if that confession be accepted as true. But the *corpus delicti* can never be proved legally by the prisoner's confession. Greenleaf on Evidence, sec. 217.

J. N. Flowers, assistant attorney-general, for appellee.

Counsel for appellant makes but one contention in this court. He says that the *corpus delicti* was not proved except by the confession of the accused.

There are two answers to this contention. In the first place, it is not necessary to prove the *corpus delicti* in cases of this kind before a confession may be offered. It is sufficient if there are some corroborative facts which may be taken in connection with a confession to prove the *corpus delicti. Heard* v. *State,* 59 Miss., 545.

In the second place, the *corpus delicti* had been proved already. It had been shown that the house had been broken into, and that the cash drawers had been opened, although nothing had been missed.

TRULY, J., delivered the opinion of the court.

Appellant was indicted for burglariously breaking and entering a storehouse with intent to commit larceny. The testimony for the state proved a breaking of the outer door, and that the cash drawers had been broken into. The intent to steal was reasonably predicable of these facts, and, even in the absence of

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positive evidence that anything was actually stolen, was sufficient proof of the *corpus delicti* to authorize the admission of the defendant's confession.

Affirmed.

JOHN A. COTTON *v.* MATTIE J. CASH.

PARTITION. *Parties.*

A decree confirming an amicable partition of land is invalid which ignores the rights of a joint owner who was a defendant to the partition proceeding in which the decree was rendered and in no way assented to the allotment agreed to by the other parties.

FROM the chancery court of Noxubee county.

HON. JAMES F. MCCOOL, Chancellor.

The appellee, Mattie J. Cash, was complainant, and John A. Cotton and others, appellants, were defendants in the court below.

Mrs. Hanna W. Cotton died in 1903, seized and possessed of certain lands in Noxubee county. Her heirs were John A. Cotton and Mrs. Mattie J. Cash, her children, and W. M. Taylor, George Taylor, and Mrs. Florence Hunter, her grandchildren, and Willie Clearman, a minor, her great-grandchild. A short time before her death she made a deed to a part of the land to appellant, John A. Cotton. After her death, appellee, Mrs. Mattie J. Cash, filed a bill in the chancery court of Noxubee county against the other heirs to have the deed made to John A. Cotton set aside on the ground that it had been obtained by undue influence and fraud, and for a partition, alleging that the Taylor heirs and Willie Clearman owned together a one-ninth interest in the land. Some time after the bill was filed, Mrs. Cash and John A. Cotton entered into an agreement to have an amicable partition made of

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the land, and commissioners were agreed on to make the partition. This was done by the commissioners, and a certain part of the land allotted to Mrs. Cash, and the remainder to John A. Cotton; no part of it being allotted to the other heirs of Mrs. Cotton. The commissioners made report to the chancery court at the next term, when Mrs. Cash made a motion to confirm the action of the commissioners; and on this motion the court rendered a decree confirming the report of the commissioners and assessing the costs, which included an attorney's fee to complainant's attorney, against Mrs. Cash and John A. Cotton equally. From that decree John A. Cotton appeals.

A. T. Dent, and *J. E. Rives,* for appellant.

Brame & Brame, for appellee.

TRULY, J., delivered the opinion of the court.

The bill of complaint filed by appellee avers that the four heirs of Mrs. Matura Taylor, deceased, who are named in the bill, are the owners of an undivided one-ninth interest in the lands sought to be partitioned herein, and this averment is nowhere in the record denied. These heirs, one of whom is a minor, were made defendants to the bill of complaint, and process was prayed for them. It was therefore error in the court below to render a final decree confirming an amicable partition of the land between appellant and appellee which ignored the interests of the Taylor heirs, before they had any opportunity to assert their rights and when they were not represented before the court. In a suit for the partition of lands every person owning an interest therein is a joint owner of every part and parcel thereof, and is entitled to have his rights adjudicated before any portion of the property is allotted to any one of his co-tenants. This one error renders the final decree herein of no effect. Wherefore it is unnecessary to consider the other assignments of error presented.

Reversed and remanded.

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MAZARA PERVANGHER v. UNION CASUALTY & SURETY CO.

ACCIDENT INSURANCE. *Construction of policy. Internal injuries. Pleadings.*

Where an accident from external means results in internal injuries the case is within the terms of an accident policy insuring "against loss effected solely, directly, and independently of all other causes, by bodily injuries .sustained through external, violent, and accidental means," and it is unnecessary in a suit upon the policy to specify in the declaration the particular organ hurt.

FROM the circuit court of Warren county.

HON. GEORGE ANDERSON, Judge.

Mrs. Pervangher, appellant, was plaintiff, and the Casualty & Surety Company, appellee, defendant in the court below. From a judgment in defendant's favor, sustaining a demurrer to the declaration and dismissing the suit, the plaintiff appealed to the supreme court.

The case was once before in the supreme court, and is reported. *Pervangher* v. *Union Casualty & Surety Co.,* 81 Miss., 32.

The defendant company issued a policy to Nazaro Pervangher, insuring him "against loss effected, solely, directly, and independently of all other causes, by bodily injuries sustained through external, violent, and accidental means." The policy provided that, if death should result from such injury within ninety days, Mrs. Pervangher, his mother, the appellant, should be paid $500. Mrs. Pervangher filed her declaration in three counts. The first count charges that the insured died April 14, 1901, within ninety days of the accident which caused his death, which was effected, solely, directly, and independently of all other causes, by bodily injury sustained through external, violent, and accidental means—to wit, injury to his lung or lungs, or some part thereof, or some part of his body adjacent to or

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connected with his lung or lungs, or the rupture of some blood vessel, caused by being strained in lifting or handling some heavy machinery or heavy substance on the 26th of February, 1901. The second count alleges the death as set out in the first, and adds that the death was caused from bodily injuries to his lung or lungs, or stomach, or some part thereof, or some part of his body adjacent thereto, connected with his lung or lungs, or stomach, or the rupture of some blood vessel, caused by being strained in lifting or handling some heavy machinery or heavy substance, and the said substance, while being so lifted or handled, fell against or struck the said assured, causing the injury hereinbefore set out and described. The third count charges the death of the assured as in the first count, and alleges that his death resulted from bodily injuries sustained through external, violent, and accidental means, in an injury to his lung or lungs, or stomach, or some part thereof, or some part of his body adjacent thereto, or connected with his lung or lungs, or stomach, or the rupture of some blood vessel, caused by some accident, the nature of which is unknown to plaintiff. The policy was made an exhibit to the declaration.

Dabney & McCabe, for appellant.

All three of the counts in the declaration are good, under the authorities. We know of no reason why recovery should not be had on an accident policy simply because the injury is internal and its exact location cannot be fixed without a *post mortem* examination, and, in case of failure to hold such an examination, that recovery could not be had on the policy.

In support of our position we cite: 1 Cyc., 248, 249, 250, 251; 1 Am. & Eng. Ency. Law (2d ed.), 294, *et seq.; Ins. Co.* v. *Gerisch,* 54 Am. St. Rep., 486; *Horsfall* v. *Pac. Mut. Life Ins. Co.,* 22 Ins. Law Journal, 892 (s.c., 63 L. R. A., 425).

McLaurin, Armistead & Brien, for appellee.

It is not sufficient to allege in a declaration in a suit on an

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accident policy that the assured was injured in his lung or lungs, or stomach, or blood vessels, or some part of his body adjacent thereto, by being strained in lifting or handling some heavy machinery or substance. It leaves open every kind of an accident to be proved on the trial without acquainting the defendant with what it is called on to meet.

There is nothing in the declaration showing that the injury complained of resulted in the ordinary and usual conduct or business of the assured. For all that appears on the face of the declaration, the assured might have been experimenting in the alleged lifting to see how much he could lift when the alleged accident happened to his lung or lungs, or stomach, or some part of his body adjacent thereto, or the rupture of some blood vessel. The policy sued on in its conditions expressly excepts liability from those "accidental injuries, fatal or otherwise, resulting from voluntary exposure to an avoidable danger." The court will notice from the cases cited in the footnote of appellant's authorities that nearly all the cases where accidents are alleged to have happened are where the assured was in the usual and ordinary course of his business, and not accidents which occurred while the assured was voluntarily exposing himself to avoidable dangers.

There is nothing in the declaration sued on, as far as its averments go, to show that the assured was under any duty or engaged in any employment which required him to engage in the lifting of the heavy machinery or heavy substance.

On the face of the declaration in this cause the court must assume that the strain and lifting of the heavy machinery or heavy substance was done voluntarily, and that the result which followed from that was the "voluntary exposure to an avoidable danger," which accidents are expressly excepted in the policy.

On the doctrine that a strain is not an accident we cite the case of *Travelers' Ins. Co.* v. *Selden,* 78 Fed. Rep., 285.

We think that this declaration is wholly insufficient to be

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pleaded to, and in fact could not be pleaded to, by the defendant with any kind of fairness to the insurance company, because we are not made aware by the declaration whether the plaintiff would expect to prove on the trial that the death of the assured occurred from an injury to one lung or both longs, or whether the injury resulting in death happened to his stomach, or whether the injury resulting in death was the rupture of some blood vessel, and if so, what blood vessel, whether or not it be such a blood vessel as would cause death by its rupture; nor would the defendant be apprised of what had been lifted, so as to present the issue if the facts warranted an issue on that score.

The declaration should aver not only the death of the assured, but that it occurred from some accident, and then state how the accident occurred "in ordinary and concise language," both as to what happened, when it happened, and how it happened; so that the defendant may be made aware of what allegations he is required to meet in the suit, otherwise the defendant would be put wholly at the mercy of anything the plaintiff saw fit to prove. *Fidelity, Etc., Co.* v. *Johnson,* 72 Miss., 333; *Cobb* v. *Preferred Mut. Accident Ass'n,* 96 Ga., 818 (s.c., 22 S. E. Rep., 976); *Globe Ins. Co.* v. *Gerisch,* 163 Ill., 628 (s.c., 54 Am. St. Rep., 486).

CALHOON, J., delivered the opinion of the court.

The demurrer is to the whole declaration, which contains three counts. We all agree that the second count is a good one, and that therefore the judgment sustaining the general demurrer must be reversed. Where an accident from external means results in internal injuries, we think it sufficient to so charge, without specifying the particular organ hurt, and it is not every strain that will take the injury out of the protection of the policy. This would depend on the facts; and if the first and third counts should be made more definite as to the circumstances of the injury, the proof might develop a case warranting a recovery under them. 1 Cyc., 248, *et seq.;* 1 Ency.,

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Syllabus.

294; *Horsfall* v. *Insurance Co.*, 63 L. R. A., 425, and notes; *Insurance Co.* v. *Selden*, 78 Fed. Rep., 285 (24 C. C. A., 92); *Insurance Co.* v. *Gerisch* (Ill.), 45 N. E., 563 (54 Am. St. Rep., 486); *Cobb* v. *Accident Ass'n*, 96 Ga., 818 (22 S. E., 976); *Feder* v. *Traveling Men's Ass'n* (Iowa), 70 Am. St. Rep., 212, and note on pages 215, 216; and especially *Paul* v. *Travelers' Ins. Co.*, 112 N. Y., 472 (20 N. E., 347; 3 L. R. A., 443; s.c., 8 Am. St. Rep., 758, and the full note to it on page 757, *et seq.*). The rulings on the various kinds of accidents arising from the acts of the assured will be found in these authorities.

Reversed and remanded.

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ROBERT LEWIS ET AL. v. STATE OF MISSISSIPPI.

1. **WITNESSES.** *Credibility. Conviction of crime. Code* 1892, § 1502. *Code* 1892, § 1746.

   The examination of a witness touching his conviction of a crime may extend to misdemeanors as well as to felonies, under Code 1892, § 1746, authorizing the examination of any witness as to his conviction of crime, and Code 1892, § 1502, defining "crime" as used in any statute to mean any violation of law liable to punishment by criminal prosecution.

2. **SAME.** *Criminal law. Co-defendants.*

   The objection of a defendant upon trial for crime to the competency as a witness of one jointly indicted with him, especially after a *nolle prosequi* has been entered as to the witness, is without merit, since the witness alone can object to being examined.

3. **JURORS.** *Competency. Code* 1892, § 2355. *Exclusion. Review.*

   An appellant cannot predicate error of the action of the trial court in excluding a proffered juror from the panel of its own motion, under Code 1892, § 2355, providing that any juror shall be excluded if the court be of opinion that he cannot try the case impartially, and the exclusion shall not be assignable as

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error; nor can error be predicated of the action of the trial court in sustaining a challenge on the ground that there is a criminal case pending against the challenged juror. (See last sentence, Code 1892, § 2354, amended Laws 1894, p. 60.)

4. CRIMINAL LAW. *Burglary. Ownership of premises.*

Actual possession of a house is the equivalent of a fee simple title as against a burglar, although the possession be wrongful as against the real owner.

5. TRIALS. *Retirement of jury.*

It is not error for the jury to be retired pending argument to the court on the competency of a witness.

FROM the circuit court of Harrison county.

HON. WILLIAM T. MCDONALD, Judge.

Robert Lewis and Robert Allen, the appellants, were indicted jointly with one Patterson for burglary. A *nolle prosequi* was entered as to Patterson. Appellants were tried, convicted, and appealed to the supreme court.

On the trial a juror of the original panel was challenged for cause by the state, on the ground that he had a case pending against him in the court. This juror had a criminal case against him. The challenge was sustained, and defendants excepted. On the trial the state introduced Patterson as a witness. Defendants objected; the objection was overruled, and they excepted. While the competency of Patterson as a witness was being discussed, the court had the jury retire over objection of defendants' counsel.

The opinion of the court contains a further statement of the facts.

Harper & Harper, for appellants.

The first objection was made to the ruling of the court in sustaining the challenge made against one of the jurors, on the ground that the juror had a case pending for trial at that term of the court, over the objections made by the defendants' counsel. This challenge was made on a clause in Code 1892, §2354, which provides that it shall be a good cause

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for challenging a juror that he has a case of his own pending in that court to be tried at that term. This clause of the statute does not apply to criminal causes, as the case belonged exclusively to the state, and he had no property right in it, and it was not a case of his own.

When the defendant, Patterson, was introduced as a witness, the attorney for the defendants objected to his competency as a witness because he was a party to the record and an interested witness; that he had neither been convicted nor acquitted, and no final order had been made upon the minutes of the court and signed by the judge dismissing him as a party from this joint indictment. The district attorney asked the court to dismiss the jury from the box and let them go out while this question was being discussed. The defendants objected and insisted that the jury should remain in the box, and that Patterson be allowed to hear the discussion. The court overruled the objection and ordered the jury to retire to their room, out of hearing of the argument, over the objections of the defendants' counsel. This may belong to the discretion of the judge, but then again it may not. What harm could come to the state in case this jury had remained in the box and had heard this argument? The defendants had the right to ask that the jury be kept so they might have the opportunity to observe the conduct and manner of this co-defendant, Patterson, and the manner and behavior of the defendants and that of their counsel during the argument on the advisability of a defendant's testimony.

The judge then decided to allow the trial of Allen and Lewis to proceed and let the testimony be admitted. *Mass* v. *State,* 17 Ark., 327 (s.c., 165 Am. Dec., 435); *Colther* v. *State,* 20 Ark., 46; *Brown* v. *State,* 24 Ark., 627; *McKenzie* v. *State,* 24 Ark., 327; *Andrews* v. *Vanduzer,* 11 John., 31; *Seymour* v. *Merritt,* 1 Root, 459; *People* v. *Vills,* 10 John., 95; *State* v. *Cart,* 1 Coxe, 1; Peake's Evidence, 100, note; *Rex* v. *Lafone,* 5 Espinasse, 154.

In the next place, the prosecution wholly failed to prove the

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ownership of the store from which the goods were taken as laid in the indictment.

Physical possession and legal possession are not the same, and the state must show that he was in legal possession, whether by lease or ownership does not matter. For this reason the case ought to be reversed.

When the defendant, Robert Allen, was put upon the stand as a witness in his own case and the examination was concluded on the part of this defendant, the counsel for the state asked the witness if he had never been convicted of causing a horse to run over Judge Neville's little son at Biloxi, Mississippi; counsel for defendant objected strenuously, but he was forced to answer, in spite of counsel's objections, that he had been tried and convicted for the offense at Biloxi. He was then asked and forced to answer, over the objection of his counsel, if he had not been convicted of stealing some cigarettes at Gulfport. Again he said yes, he had been convicted.

It is not permissible to show in any trial at law that the defendant has been convicted of another crime differing from the one for which he is being tried, and the object being to show the intention of the defendant.

J. N. Flowers, assistant attorney-general, for appellee.

One Jackson, a member of the original panel, was challenged for cause by the state on the ground that he had a case pending in that court and for trial at that term. Counsel say that sec. 2354 of the code does not embrace jurors who have a criminal case pending in the court, triable at that term. We fail to discover the slightest merit in this contention.

It is insisted that the court below committed an error in permitting the state to introduce as a witness James Patterson, who was jointly indicted with these appellants. We hesitate to criticise this contention of counsel, simply because it strikes one as being so clearly without merit. Whatever the law may be in other states and countries, sec. 1738 of our code (1892)

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makes parties to the record competent witnesses. Patterson might have been introduced by the defendants or by the state, but could have refused to testify to anything which would incriminate himself. This is a personal privilege which could not be invoked by others.

In connection with this question counsel complain that the court had the jury to retire while the competency of Patterson, as a witness, was being discussed. Here, too, the reason is too far for me to seek. The ownership of the baker's shop was sufficiently shown for the purpose of an indictment of this kind. 1 Wharton's Crim. Law, sec. 804.

It was not necessary to allege or prove the ownership of the building. This is true, since it is settled that the ownership of the property stolen need not necessarily appear. *Brown* v. *State,* 72 Miss., 990.

Argued orally by *A. Y. Harper,* for appellants, and by *J. N. Flowers,* assistant attorney-general, for the appellee.

Calhoon, J., delivered the opinion of the court.

Code 1892, § 1502, defines "crime" to mean, "when used in any statute, any violation of law liable to punishment by criminal prosecution." Section 1746 authorizes the examination of any witness as to "his conviction of any crime," and *Helm* v. *State,* 67 Miss., 562 (s.c., 7 South., 487), properly holds that the inquiry applies as well to misdemeanors as to infamous crimes.

It was not reversible error to sustain the state's challenge of the juror Jackson for the cause that there was a criminal case pending against him in that court. If the court had set him aside of its own motion, the action could not have been assigned for error. Code 1892, § 2355. The court is under a duty to see that there is a fair and impartial jury. There is no pretense here that the trial was not by such a jury; neither side exhausted its peremptory challenges, and neither side has any vested right in particular jurors.

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Syllabus.

The ownership of the property as charged in the indictment and shown in the evidence is sufficient. The charge is that the place was "a certain baker shop, the property of one William Grimes," and the proof is that William Grimes had used and occupied it as a baker's shop for eighteen months. This is enough, though the fee simple of the house was in another person. Possession is enough as against burglars. Wharton, Cr. Law (10th ed.), sec. 804. And this is true even if the possession be a wrongful possession. 1 McClain, Cr. Law, sec. 508.

We think James Patterson, who was jointly indicted with appellants, was a competent witness in this state, especially after *nol. pros.* as to him. He alone could object to being examined. *State* v. *Michel* (La.), 35 South., 629.

It is not just ground of error that the jury was retired pending argument to the court on the competency of a witness.

Affirmed.

JAMES DEAN v. STATE OF MISSISSIPPI.

1. **CRIMINAL LAW.** ***Homicide. Murder. Principal and accessories.***

   One who aids, assists, and encourages a murder is a principal, and not an accessory; and his guilt in no wise depends upon the guilt or innocence, the conviction or acquittal, of any other alleged participant in the crime.

2. **SAME.** ***Instruction. Designating killing as murder.***

   If it be unquestionable that a murder was committed, and the only inquiry be as to the identity of the criminal, reversible error cannot be predicated of an instruction because it refers to the crime as murder.

3. **SAME.** ***Evidence.***

   In a trial for murder, committed as a result of a conspiracy to rob the deceased, the admission of testimony tending to show that money was in the decedent's house before the murder and not there afterwards, and that decedent's wife was murdered and the house burned during the same night the deceased was killed, is not reversible error.

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FROM the circuit court of Holmes county.

HON. A. McC. KIMBROUGH, Judge.

Dean, the appellant, was indicted, tried, and convicted of murder and sentenced to be hanged, and appealed to the supreme court.

Dean was jointly indicted with William and Samuel Campbell for the murder of one Washington Honey. There was a severance, and Dean was tried, with the result above stated. His motion for a new trial was overruled.

The evidence showed that on the night of the 18th of December, 1903, Washington Honey and his wife were murdered in Holmes county, their bodies placed on a bed, face down, in their cabin, and the cabin burned. That on examination of their bodies it was found that they had been killed by blows with some blunt instrument. They occupied the cabin alone, which was about a mile and a half from the residence and store on the same plantation. That Washington Honey had $55.25 in silver at his home, and nothing could be found of this silver after the cabin was burned. That early in the night of December 18th he went to the store and made arrangements to make a crop for another year with the manager and storekeeper, who lent him $25. Dean was seen at the store, peering through the window where and when Honey was paid the $25. Washington Honey and his brother and another man left the store together about eight o'clock in the evening to go home, and Dean left after them, riding a white mule, with a woman riding behind him, and four shots were heard by witnesses who left the store going in the same direction after the departure of Honey and his party. That on the night of the murder Dean brought the woman, Louisa Smith, from Tchula to the store, and took her home with him, where the two stayed that night. This woman testified that she heard Dean and William Campbell plotting at the store to rob Washington Honey and his wife, and that, when Washington Honey was getting the money at the store, Campbell said to Dean he would have that money if he had

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to get a crowd and kill him, and told Dean to fire a pistol five times after Washington left the store to let it be known that Washington had started home; that she and Dean rode on behind Washington, and Dean fired the pistol four times, she preventing him from firing the fifth time; that they came up behind Washington about sixty feet from his home, and were near him when William Campbell struck him in the face with an ax; that Washington fell, and Dean helped the other two, Samuel and William Campbell, carry him into the house and lay him in the bed beside his wife, who was dead; that the ax was left in the middle of the floor; that Dean asked one of the Campbells how much money they got from the woman, and he said it had not been counted; that after leaving the house the two Campbells returned, saying they would burn it.

The defendant offered in evidence the record showing the acquittal of William Campbell of the murder of Washington Honey, which was excluded by the court, and he also offered to prove that the witness, Louisa Smith, was in custody, charged with the same crime for which defendant was being tried. This was excluded.

The defendant assigned as error the giving of the second, third, fourth, and fifth instructions for the state, and the refusal of the eleventh asked by defendant; the exclusion of the record and the evidence of the charge against the Smith woman; the admission of evidence for the state tending to show that Cora Honey, wife of Washington Honey, was murdered; the admission in evidence of the fact that the silver money was in the house before the murder and not there afterwards; the admission of the evidence of the burning of Washington Honey's house.

The instructions complained of are as follows:

"(2) The court instructs the jury that the law does not require you to know that the defendant is guilty before you return a verdict of guilty as charged, but only that you should

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believe him guilty, beyond all reasonable doubt, from all the evidence considered together.

"(3) The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that Washington Honey was murdered as alleged in the indictment, and that on the night of the killing, and before the murder, James Dean had an agreement with the person who actually committed the murder that he, James Dean, would aid in the murder or robbery of Washington Honey that night by firing his pistol to give notice that Washington Honey had left the store and was on his way home, and that such firing for such purpose was done by James Dean pursuant to such agreement, and that the three—Dean, Samuel Campbell, and William Campbell—then met and murdered Washington Honey, then the jury should find James Dean guilty of murder.

"(4) The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that James Dean was present at the time of the killing of Washington Honey, with intent to aid and abet in the murder of Washington Honey if his assistance became necessary, and that Washington Honey was murdered as charged in the indictment, then James Dean is as guilty as the one who did the killing, though he may not have actually taken any other part in such homicide.

"(5) The court instructs the jury that if they believe from the whole evidence, beyond a reasonable doubt, that Washington Honey was murdered, and that James Dean aided, assisted, and encouraged William Campbell or any other person in murdering Washington Honey, then he is as guilty as such other person, and the jury should return a verdict of guilty."

The eleventh charge asked for defendant and refused was as follows: "(11) The court instructs the jury that they cannot find the defendant guilty if they have a reasonable doubt as to whether William Campbell did willfully and feloniously, and of his malice aforethought, kill and murder Washington Honey."

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R. C. McBee and *S. M. Smith,* for appellant.

The second instruction for the state was an attempt to define a "reasonable doubt," or rather to state what would not be a reasonable doubt, and in effect charged the jury that they might convict on a less degree of certainty of guilt than the law requires.

"The law does not require you to know," etc. The knowledge referred to is, of course, that character of knowledge that is based on information received from others—to wit, the witnesses in the case; for if the members of the jury themselves possessed actual personal knowledge of the fact, they would have been disqualified to serve in the case.

This character of knowledge is "nothing more than a man's firm belief." 18 Am. & Eng. Ency. Law (2d ed.), 67, 68. "Know," as defined by Webster, means "to be aware of as true or actual; to have mental cognition of; to perceive or apprehend clearly; to be convinced of the truth of; to have information of; to be assured of." Apply either of the above definitions to the above instruction and the same will be seen to be erroneous. *Williams* v. *State,* 73 Miss., 823; *Powers* v. *State,* 74 Miss., 777; *Jones* v. *State,* 36 South. Rep., 243.

The third instruction for the state is erroneous. First, it does not correctly announce the law of conspiracy; and second, it refers to the crime under investigation as "the murder," and to appellant's alleged principal as "the one who actually committed the murder."

It is for the jury to determine whether an act done by a member of a conspiracy is done in furtherance of the common design, as well as what are the natural and necessary consequences of such act. 6 Am. & Eng. Ency. Law (2d ed.), 872; *Spies* v. *People* (Ill.), 3 Am. St. Rep., 320; *Bowers* v. *State* (Tex.), 5 Am. St. Rep., 901; *Amos* v. *State* (Ala.), 3 South. Rep., 751; *Tanner* v. *State* (Ala.), 9 South. Rep., 615; *State* v. *Furney* (Kan.), 13 Am. St. Rep., 267; *Powers* v. *State* (Ky.), 53 L. R. A., 253.

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This principle of the law of conspiracy was lost sight of by the court below in passing on this instruction, and it was assumed as matter of law, instead of being left to the jury as a question of fact, that if the deceased was murdered by one of the parties to a conspiracy to rob, such murder was committed in furtherance of the common design.

Appellant was jointly indicted with William Campbell, all the evidence in the case showing that if he was guilty at all, it was of aiding and abetting William Campbell, and not any other person. The only witness who claimed to have been present at the alleged killing fully identified William Campbell as the one who struck the blow, and by her testimony negatived the possibility of its being done by "any other person." No inference could be drawn from the evidence that "Dean aided, assisted, and encouraged . . . any other person in murdering Honey," except Campbell. Under the evidence he was either guilty of aiding and abetting Campbell or he was innocent. It is true that by the evidence for the defense Campbell was shown to have been at another place at the time in question, but that cannot change the rule. Would the state, in rebuttal, have been allowed to prove that its evidence in chief was not true, and that another person had actually struck the blow? Grant that it is not necessary for the proof to show who was the actual principal, but when the proof does show who was the principal, the state must then stand or fall by the guilt of the proven principal.

The record of acquittal of William Campbell was admissible in evidence on two grounds: First, under the authority of *Crum* v. *Wilson*, 61 Miss., 233, and *Jones* v. *State*, 66 Miss., 380; and second, because under the third instruction for the state, appellant's guilt depended upon the existence of a conspiracy to which William Campbell was a party.

A guilty aider and abettor, of course, presupposes a guilty principal. *Strait* v. *State*, 77 Miss., 693. And if the principal is innocent, the aider and abettor must be innocent also; and,

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in reason, it follows that the record of acquittal of the principal is available to the aider and abettor subsequently tried.

William Williams, attorney-general, and *Noel, Pepper & Elmore*, for the appellee.

The trial court was exceedingly liberal to appellant in the matter of instructions on reasonable doubt. In behalf of defendant it went to the extreme verge of that doctrine, and probably a little beyond. 1 Blashfield on Instructions to Juries, 385, 391.

The criticism of the third instruction takes the view that the law of conspiracy is strained too far in its reference to intended robbery culminating in murder, and that the reference to the crime under investigation as "the murder" and to appellant's alleged principal as "the one who actually committed the murder" are assumptions of facts.

Appellant claims that murder and robbery are such unrelated crimes that the conspiracy to rob does not include murder as one of the natural or probable incidents. It will be remembered—instructions should be considered as applied to the evidence—that the state's evidence showed that William Campbell was present when Washington Honey was paid money, and informed appellant he would have that money if he had to kill, and that appellant and one of the state's witnesses followed Honey to the place of the killing and were present, appellant helping to dispose of the body and asking for part of the money. This court held in one of the last reports, *Smith* v. *State*, 82 Miss., 793, that an indictment for robbery, omitting to allege putting in fear of immediate danger to his person, was fatally defective. Threatened death is the usual means of effecting robbery, and execution of the threat frequently results.

All who conspire to do such unlawful act as will probably result in taking of human life are presumed to have understood the consequences which might reasonably be expected from car-

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rying it into execution and to have given their assent. *Spies* v. *People,* 122 Ill., 226; *Peden* v. *State,* 61 Miss., 267; *Lusk* v. *State,* 64 Miss., 850; *Brabston* v. *State,* 68 Miss., 219; *McGehee* v. *State,* 62 Miss., 772; *Wynn* v. *State,* 63 Miss., 264; *Pollard* v. *State,* 53 Miss., 410.

The objection raised to the fourth instruction is, chiefly, that something more is required to convict a principal in the second degree than presence at a murder with intention to aid and abet if it became necessary. This instruction is the same as that approved in *Wynn* v. *State, supra.* The same doctrine has been announced time and again in this state. *McCarty* v. *State,* 26 Miss., 303; Wharton on Homicide, sec. 333.

While sec. 950, Code 1892, provides for the indictment and punishment of accessories before the fact as principals, it is unnecessary to invoke that statute. At common law Dean was a principal, originally a principal in the second degree, a distinction without a difference; and, as stated by Bishop in his Criminal Law, sec. 648, "There is no practical reason for retaining it in exposition of common law." As there shown and in his work on Criminal Procedure, 2d vol., sec. 3, convictions can be had without reference to whether the indictment is for principal in the first or second degree.

The record of acquittal of William Campbell was not admissible. An accessory before the fact is one who is not present at the time of the commission of the crime, but counsels, procures, or commands its perpetration. *Unger* v. *State,* 42 Miss., 642; 1 Am. & Eng. Ency. Law, 257, 258 (2d ed.); 2 Roscoe's Crim. Ev., 944.

If the defendant "be actually or constructively present when the felony is committed, he is an aider and abettor, and not an accessory before the fact." Hughes' Crim. Law & Procedure; 1 Hale P. C., 615; *McCarty* v. *State,* 26 Miss., 303.

Both at common law and under our law abettors may be convicted, though the principal be acquitted. *People* v. *Bears,*

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10 Cal., 68; *State* v. *Whitt,* 113 N. C., 716; *Searles v. State,* 60 Cir. Ct. Rep., 331.

"No evidence touching the guilt of the accused in the particular case on trial, of whatever sort, is rejected merely because it may disclose another offense." *Raines* v. *State,* 81 Miss., 497, 498.

TRULY, J., delivered the opinion of the court.

The chief argument in behalf of appellant, as to both the proof and the instructions, is based upon the fallacious assumption that he was merely an accessory of William Campbell, who was jointly indicted with him. This argument is unsound. Both at common law and by statute, appellant was a principal, and his guilt in no wise depends upon the guilt or innocence, the conviction or acquittal, of any other participant in the commission of the crime. If appellant "aided, assisted, and encouraged" in the murder, he was guilty as charged, whether his confederate was Campbell or "any other person," and the fifth instruction for the state correctly so announces.

Nor are the instructions for the state justly subject to condemnation by reason of the fact that they speak of the crime being investigated as "murder." Under the testimony in this case the degree of the crime committed cannot be questioned; the only inquiry was the identity of the criminal, and this was established by competent testimony to the satisfaction of the jury. In our judgment, no ruling of the court on the admission of the testimony constitutes reversible error under the facts of this record.

Affirmed.

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FRANK M. DALE ET AL. v. JAMES T. HARRAHAN.

FRAUDS. *Property used in business. Undisclosed principal. Business sign. Code* 1892, § 4234.

Where a claim is made to property which has been seized under execution against a firm, one member of which had taken out in his own name a privilege license to carry on the business in which the property was used, advertised sales of such property in the name of the firm, used shipping tags in its name, and made sales and rendered accounts in his own name, the claimant cannot prevail by proving a purchase of the property from the debtor firm and the employment of such member thereof as his agent, when it further appears that the member so carrying on the business has failed to disclose the name of his principal or the real owner by a sign in letters easy to be read placed conspicuously at the house where such business is carried on, since for want of such sign, under Code 1892, § 4234, the property employed in the business is liable for his debts.

FROM the chancery court of Warren county.

HON. W. P. S. VENTRESS, Chancellor.

In March, 1899, J. T. Harrahan, appellee, recovered a decree in the chancery court of Warren county against E. M. McAdams, J. H. McAdams, and W. L. McAdams, composing the firm of E. M. McAdams & Sons. On February 25, 1902, an execution was issued for the balance then due of this decree, and levied on twelve mules in the possession of W. L. McAdams. F. M. Dale, one of the appellants, filed a claimant's affidavit, claiming the property levied on as belonging to appellants F. M. Dale & Co., and gave the required bond. On the trial of the claimant's issue the evidence showed the following facts: The firm of E. M. McAdams & Sons were engaged in business as dealers in mules for a number of years prior to 1896, and occupied a stable at 310 West Grove street, in Vicksburg, and had a sign in front of the stable bearing the firm name of E. M. McAdams & Sons. They became insolvent, and sold their

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business to W. J. Howard and F. M. Dale in January, 1896. The stable property was assessed to E. M. McAdams & Sons for the years 1896, 1897, and 1898, and for the years 1899 and 1900 it was assessed to Shelton, Dale & Co., and in 1901 and 1902 it was assessed to Frank M. Dale & Co. In 1896 or 1897 the firm of Shelton, Dale & Co. commenced doing business at this same stable, with E. M. McAdams & Sons as agents, and the sign was changed as follows: "E. M. McAdams & Sons, Agents for Shelton, Dale & Co." In 1898 the firm of F. M. Dale & Co., composed of the appellants, bought the business and continued to run it, and this sign was not changed, and was there when the execution was levied. When the firm of F. M. Dale & Co. was formed and took possession of the business, in 1898, they made a contract with W. L. McAdams by which he was employed by them to work for them in the sale of mules. The evidence showed that the mules levied on belonged to F. M. Dale & Co., in fact, and that W. L. McAdams had no interest in them, but was only employed by F. M. Dale & Co. at a fixed salary. W. L. McAdams took out a privilege license to conduct a sales stable in his own name as agent for an undisclosed principal. He caused advertisements to be published in the local papers, used shipping tags in the name of E. M. McAdams & Sons, and made sales of stock and rendered accounts in his own name. From a final decree holding that the mules levied on were liable to be sold under the execution, the claimants appeal.

Dabney & McCabe, for appellants.

It is not pretended that there was any fraud or collusion between the claimants and E. M. McAdams & Sons or W. L. McAdams. Indeed, there is no serious controversy as to the fact that the mules in question really belonged to the claimants and that W. L. McAdams was merely their agent. Section 4234, Code 1892, was not designed to meet such a case. It cannot be said with any show of reason that a firm (E. M. McAdams & Sons) which was not in existence at the time the levy was made,

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and had not been for many years prior thereto, the members of which resided in a distant state, who had no interest in the stable itself, none in the mules used and acquired in the business, none whatever in the business itself, who had nothing to do with buying the stock or paying for the same, who had nothing to do with the payment of the taxes on the property or on the business, no interest whatever in the bank account, and no interest, directly or indirectly, in the profits of the concern, could be said to be transacting the business within the meaning of the statute. *Harris* v. *Robson,* 68 Miss., 506.

Nor can it be said that a quondam member of such a firm, who had no interest in the property, no interest in the mules used and acquired in the business, no interest in the business itself, nothing to do with the buying of the stock, nothing to do with paying for the same, nothing to do with the shipping of the same, nothing to do with the payment of the taxes on the property, or on the mules, or on the business, whose money did not go to the payment for the feed bills for the stock, who had no interest whatever in the bank account, who had nothing to do with insuring the mules—in short, who had no interest in the business whatever, nor in the proceeds and profits arising therefrom, but was a mere hired employe, working for a salary—can be said to be transacting the business within the sense and meaning of the statute. *Bufkin* v. *Lyon,* 68 Miss., 255.

But it is objected that the sign did not truly disclose the name of W. L. McAdams' principal in this matter; that the sign says that Shelton, Dale & Co. were the principals, whereas Shelton had no interest in the business, but the business belonged to F. M. Dale & Co. In other words, it is seriously contended that because F. M. Dale & Co. had not changed the sign the second time so as to show the exact ownership of the stable and of the mules, the complainant is entitled to subject their property to the payment of his debt. The absurdity of such a proposition is manifest. It has already been shown that when E. M. McAdams & Sons sold out the stable and quit business in

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Vicksburg and left here themselves, Shelton, Dale & Co. purchased the stable and the business from them, and that in order to prevent future trouble of any kind they had the sign so changed as to show that the business which had previously been conducted in the name of E. M. McAdams & Sons would be thereafter conducted under that name, as agents for the benefit of the purchasers. It will also be remembered that in buying out the stable they bought the good will of E. M. McAdams & Sons, and in order to obtain the good will it was thought proper to allow their names to remain upon the stable in future as it had been in the past. When this sign was changed to conform to the then ownership, it was exact; but some years afterwards Mr. Shelton withdrew from the firm, and it seems it was not thought necessary, or not known to be necessary, to have his name stricken from the sign, hence it was allowed to remain "Shelton, Dale & Co." up to the time of the levy in this case. And we insist that while the sign was not at the time of the levy technically correct, it was sufficient. It showed, first of all, that the business was not being conducted by E. M. McAdams & Sons or by W. L. McAdams individually, or for their own benefit, but that they were conducting it as agents for some one else. In other words, it showed that they did not own the property, but that some one else did. In the second place, it did show who were the principals in that business—namely, Dale & Co., a firm composed of F. M. Dale and J. W. Howard. That Dale & Co. were the owners of the stable and of the business no one can gainsay. It is true that the sign added, in effect, that Mr. Shelton was still interested in the business, which, in point of fact, was not true. This error, insignificant in itself, is not sufficient, in view of all the other evidence in this case, to render the claimants' property liable for their hireling's debt. We repeat that the names of the principals were disclosed by the sign, and that was all that was required by the statute.

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Smith, Hirsh & Landau, for appellee.

W. L. McAdams, a member of the firm of E. M. McAdams & Sons, was carrying on the business of the stable without disclosing the name of his principal by a sign of the character specified in Code 1892, § 4234; and the property levied on, being employed in that business, was clearly subject to his debts. *Quin* v. *Myles,* 59 Miss., 375; *Loeb & Bloom* v. *Morton & Co.,* 63 *Ib.,* 288; *Hamblett* v. *Steen,* 65 *Ib.,* 474; *Payne* v. *Hall Safe & Lock Co.,* 64 *Ib.,* 175.

TRULY, J., delivered the opinion of the court.

The chancellor decreed that the mules in question were liable to be sold under the execution issued on appellee's judgment against E. M. McAdams & Sons, of which firm W. L. McAdams was a member. This record discloses no reason why we should disturb that finding. Under no view of the case can the property escape liability for the debts of W. L. McAdams under the provisions of § 4234, Code 1892. That statute fixes the ownership primarily in the person by whom the business in which the property is used or acquired is conducted. If, in point of fact, that be not true, in order to escape liability for his debts the name of the real owner must be disclosed in the manner pointed out by that section. In the instant case the chancellor held, upon a finding of fact, that W. L. McAdams was the person transacting the business, and the record supports this conclusion. Privilege license to conduct a sales stable was taken out by W. L. McAdams in his own name as agent for an undisclosed principal. He inserted advertisements in the local papers, used shipping tags in the name of E. M. McAdams & Sons, made sales of stock and rendered accounts in his own name. This fixed the ownership of all the property used or acquired in such business in him, and, as to his creditors, rendered the same liable to his debts. The express terms of the statute so declare. In order to escape this result, it was necessary to follow the method pointed out by sec. 4234, *supra*—*i. e.,* to disclose the

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name of his principal or the real owner "by a sign in letters easy to be read placed conspicuously at the house where such business is transacted." This was not done in the case at bar. The sign in use here failed to disclose either the name of the person who was transacting the business or that of his principal. In endeavoring to obtain the benefit of W. L. McAdams' "good will" and busines reputation, appellants unwittingly rendered their property liable to his debts.

Affirmed.

FERNWOOD LUMBER CO. *v.* MEEHAN-ROUNDS LUMBER CO.

1. CHANCERY COURTS. *Jurisdiction. Fraudulent conveyances. Code* 1892, § 503. *Lis pendens. Code* 1892, §§ 2782–2789.

   The provision of Code 1892, § 503, enlarging the chancery court jurisdiction of bills by creditors to vacate fraudulent conveyances, that the creditor shall have a lien on the property from the filing of his bill, except as against *bona fide* purchasers before the service of process on the defendant, is not affected by Code 1892, §§ 2782-2789, the chapter on *lis pendens*, the two statutes referring to different classes of litigants.

2. SAME. *Practice. Process. Non-resident defendants. Code* 1892, § 3421. *When service complete.*

   A non-resident defendant in chancery, under Code 1892, §3421, regulating process by publication and mailing for such defendants, is not served with process so as to authorize proceedings against him as if personally served until the completion of the required publication, and, in case his postoffice be known, the proper mailing of a summons to him.

3. SAME. *Concrete case.*

   Where, in a suit under Code 1892, § 503, *supra*, to set aside a conveyance as fraudulent, a *lis pendens* notice was filed, under Code 1892, §§ 2782, 2789, *supra*, but the grantee in the deed, a non-resident defendant, without actual notice of the suit, conveyed the property to a *bona fide* purchaser before the completion of the publication and mailing of process against him, under Code 1892, § 3421, *supra*, the purchaser will be protected in his title.

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FROM the chancery court of Lauderdale county.

HON. STONE DEAVOURS, Chancellor.

The Meehan-Rounds Lumber Company, the appellee, was the complainant, and the Fernwood Lumber Company, the appellant, was defendant in the court below. From a decree in complainant's favor the defendant appealed to the supreme court. The opinion states the facts of the case.

A. S. Bozeman, for appellant.

It was contended by the appellee that it was a *bona fide* purchaser for value of the lands in question without notice of the pendency of the said suit between this appellant and Greene and Thomas, and without knowledge of the fraudulent character of the conveyance from Greene to Thomas, and that it acquired good title to said lands unaffected by the decree in said cause.

On the contrary, it was contended by this appellant that by the filing of its creditors' bill, under sec. 503 of the annotated code, on February 5th, 1902, and by the filing and record of its *lis pendens* notice on the same date, and by the first publication of the summons for the defendant on February 15th, 1902, it acquired a lien upon the property in question as against appellee, and that the final decree rendered in said cause condemning said property to be sold to pay the amount of said decree was binding against the appellee, who did not acquire title to said property until February 18th, 1902.

The court below held that the appellant's lien on the lands in question, acquired in the suit of this appellant against Greene and Thomas, did not become effective as against the appellee, who was not a party to the suit, until after the completion of the publication for the non-resident defendants. We submit that the court erred in this and that the decree should be reversed.

"The general and established rule is that a *lis pendens,* a pending suit in equity, duly prosecuted and not collusive, is notice to a purchaser of the property in dispute from a party to the litigation, so as to affect and bind his interest by the decree;

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and the *lis pendens* begins from the service of the subpoena after the bill is filed." 2 Pom. Eq., 632.

Based upon the rule of necessity, a theory adopted by some courts of the highest authority, Mr. Pomeroy formulates the general rule as follows: "During the pendency of an equitable suit, neither party to the litigation can alienate the property in dispute, so as to affect the rights of his opponents."

This is the *rationale* of the doctrine adopted by the courts of this state. This court says: "The technical notice arising from *lis pendens* has its foundation in necessity; for it would be impossible for any suit to be brought to a successful termination if alienations pending the suit could prevail." *Allen* v. *Poole,* 54 Miss., 333.

The appellee claims to be a *bona fide* purchaser for value from Thomas, one of the defendants in the suit of this appellant against Greene and Thomas, without notice of the pendency of that suit; and the question, therefore, is, When did that suit become *lis pendens* as to appellee?

The defendants in that suit were non-residents of this state (though the land in question was situated in Lauderdale county), and the service of process upon the defendants was by publication.

The bill was filed on February 5th, and the first publication was made for the defendants on February 15th. (We omit now wholly the consideration of the *lis pendens* notice and its effect.) Copies of the publication were mailed to the defendants on February 20th, and the three weeks were completed on March 7th, the third publication having been made on March 1st.

The deed from the defendant, Thomas, to the appellee was delivered and the purchase price paid on February 18th of the same year. The question, then, is, on the facts of this case, Did the suit become *lis pendens* as to appellee on the filing of the bill and the first publication for the defendants? If so, then the appellee is a purchaser *pendente lite,* and is bound by the decree in that case; because, up to the time of the first publication,

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February 15th, the appellee had done nothing by which it came within the definition of an innocent purchaser, which is that he is one who, at the time of his purchase, advances some new consideration, surrenders some security, or does some other act, which leaves him in a worse position should his purchase be set aside. Perry, Trusts, sec. 239.

But if that suit did not become *lis pendens,* as to appellee, until the completion of the three-weeks publication, and if it required the full three-weeks publication to constitute service of process upon the defendants within the meaning of sec. 503 of the code, then (unless appellant is protected by filing the *lis pendens* notice) the appellee is within the exception in sec. 503 and is not affected by the decree in that case.

I submit that under sec. 503 the appellant acquired a lien on the property in question, as against appellee, upon filing the bill and the first publication of the summons. I have been unable to find any decision of this or any other court upon this exact point; and in so far as I have been able to ascertain, it is an open question in this state. Looking then to the statute, sec. 503, and the rule of *lis pendens* as it existed prior to the statute, we find the reason of the rule as stated by this court in the case of *Allen* v. *Poole, supra,* and as stated more fully by Chancellor Kent in the leading case of *Murray* v. *Ballou,* 1 Johns' Ch., 566, to be that "without it, as has been observed in some of the cases, a man, upon service of subpoena, might alienate his lands and prevent the justice of the court. Its decrees might be wholly evaded."

Our contention, therefore, that the suit becomes *lis pendens* on filing the bill and making the first publication of summons, is clearly within the reason of the rule.

The first publication of the summons, as much as the service of process personally, notifies the defendant of the pendency of the suit, and it is from this date that the temptation or purpose comes to the dishonest defendant to evade the decree of the court by an alienation of the property in question. And unless

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the suit becomes *lis pendens* from this date—or, in other words, if the non-resident defendant has three full weeks after the first publication of summons, within which he may alienate the property in litigation—then the reason of the rule is nullified, and the non-resident defendant is not only not prevented from evading the decree of the court, but is actually given notice that he has three weeks within which he may evade it.

It will not do to say that the "service of process" required by the rule and by the statute is personal service only, and actual notice of the pendency of the suit, because it is established that such service of process may be by any of the modes prescribed by statute—*e. g.*: (1) By leaving a copy of the summons at the usual place of abode of an absent defendant, with a member of his family, or (2) by posting a copy on his door, or (3) by publication.

All these modes of service of process, except by publication, consist of one instantaneous act. Service by publication is a continuous act extending over a period of three weeks. Now, if it were possible for a defendant upon whom process was being served—*e. g.,* by posting a copy on the door—to alienate the property after the act of posting began and before it was completed, no court would hold that the *lis pendens* had not attached as to the purchaser, or would permit its decree to be thus evaded.

It cannot be the law that pending the publication—*i. e.,* after the first publication has been made, but before the third publication, or even after the third publication, but before the expiration of the three weeks from the date of the first publication—the absent defendant can alienate the property in dispute so as to effectually evade the decree of the court.

G. Q. Hall, Hall & Jacobson, for appellee.

Our contention is that there was no "service of process" upon the defendants, Greene and Thomas, until after copy of summons had been mailed and publication for three weeks made, as required by statute, and the purchase by Meehan having been

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made before such time without notice of the suit, we think he is within the saving clause of sec. 503.

The appellant contends that it acquired a lien on the property in question upon filing its bill and first publication, under sec. 503, which the law charged Meehan with notice of at the time of his purchase.

Section 3421, after authorizing service by publication, reads as follows: "Upon proof of publication of such summons for three weeks in some newspaper published in the county . . . and of the mailing of a copy of the summons to the defendant at his postoffice, where it is stated, the defendant may be thereafter proceeded against as if he had been personally served with a summons in the case in this state."

We submit that this latter section furnishes the definition of "service of process" by publication in cases under sec. 503 as in all other cases. It is unescapable that service of process in such cases is only after copy mailed, where the address is given as here, and publication completed. It is only after the doing of all the things required by law that our courts acquire jurisdiction of non-residents, and it is the law that a suit does not become *lis pendens* until jurisdiction has been acquired of defendants.

We are not without authority of precedents in this conclusion. 21 Am. & Eng. Ency. Law (2d ed.) announces, upon the authority of a great number of decisions collated in note 5, that *lis pendens* will commence upon service of process by publication only when the order to publish has been fully executed.

Appellant's construction leaves out of consideration secs. 3421 and 3422, and is entirely out of harmony with the history of sec. 503 and the previous general law of *lis pendens* in this state.

At the common law, and under the decisions of our court, a simple contract creditor, before judgment obtained and execution returned unsatisfied, could not exhibit his bill in such cases as this. *Ins. Co.* v. *Ligon*, 59 Miss., 305. Even after judgment

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and execution the doctrine of *lis pendens* did not apply, unless the judgment sued upon was duly enrolled. *McCutchen* v. *Miller,* 31 Miss., 82. The legislature changed both rules in the enactment of sec. 503. Now, the law also was that the doctrine of *lis pendens* did not become operative until after service of process on the defendant. *Bacon* v. *Gardner,* 23 Miss., 60; *Allen* v. *Mandaville,* 26 Miss., 397; *Allen* v. *Poole,* 54 Miss., 323; *Chaffee* v. *Halpin,* 62 Miss., 1. It being the pendency, not the beginning or commencement, of a suit that commences the *lis pendens* lien (*Allen* v. *Mandaville, supra*), sec. 670 of the code has wrought a modification of the old rule as to when suits at law are *lis pendens.* But we find no such statute changing the rule as to suits in equity; nor are we unmindful of chapter 85, in the making of that statement, and shall directly discuss the bearing of the chapter.

Section 503 is, therefore, practically a declaration of the old general rule of *lis pendens* applied in favor of the simple contract creditor—at least, as to *bona fide* purchasers. We say it is merely a declaration of the old rule, because the doctrine of *lis pendens* had reference only to purchasers after suit. The "lien" that sec. 503 provides from the filing of the bill, except as to *bona fide* purchasers, is as against creditors, and has been held to be merely an order of priority among creditors. *Levy* v. *Marx,* 18 South. Rep., 575. But, however that part of the section may be, it contains an express provision, as under the old rule, that *lis pendens* as to *bona fide* purchasers shall not commence until after service of process upon the defendant in such bill; and we have demonstrated, on authority and express provision of the statute, that service of process by publication is as we have stated.

We submit that, even measured by the appellant's arbitrary definition of "service of process" by publication in such cases, the decree of the chancellor is correct. Section 3422, as we have shown, requires something else besides publication, as of equal or possibly more importance—to wit, the mailing of a

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copy of the summons to the defendant contemporaneously with the handing of the summons to the publisher. If he intended his construction to be anything more than entirely arbitrary, he should have included this requirement of mailing notice along with first publication, as being service of process by publication within the meaning of sec. 503; but this would have been to give away his case, for the copy of summons in this case was not mailed until two days after the deed came into Meehan's hands and had been paid for, and seven days after it came into the hands of an escrow, the Meridian National Bank.

Chapter 85, Code 1892, either supplements or abrogates the previous law of *lis pendens.* It would seem that its provisions in their very nature were intended only to supplement.

There was no such thing as notice of pendency statutes at the common law, and therefore no requirement to file notice. By virtue of the doctrine of *lis pendens,* all the world was charged with constructive notice of the lien of a pending suit, seeking to enforce some lien, claim, right, or interest in property specifically described in the declaration or bill, and the reason of the rule was put upon various theories, one of which was that all persons were presumed to be attentive to proceedings in the courts of justice. 21 Am. & Eng. Ency. Law (2d ed.), 595, *et seq.* But all persons were not attentive, in fact, to such proceedings, and the application of the doctrine worked hardships upon innocent purchasers of property thus affected, and the best thought was toward devising some scheme whereby all persons might easily advise themselves without plowing through the records of a court, or, in fact, all the courts. The remedy was found in these statutes. *Id.,* 612, *et seq.* Mississippi dropped into line with ch. 85, Code 1892.

The legislature made no change in the *lis pendens* of sec. 503 and other equity suits (sec. 670 in reference to suits at law had been enacted long before ch. 85 was thought of); nor did it see fit to strike out the saving clause of sec. 503, as inconsistent, when the section was amended by ch. 64, p. 82, of the acts

of 1898. It seems to us to follow that the intention was that the creditor, taking advantage of sec. 503, should likewise abide its limitations, unaffected by anything that he might do under ch. 85. This must be true, else we should have the mere filing of notice creating *lis pendens* from the time of filing his bill, in favor, even, of simple contract creditors, who enjoyed no such favor at the common law, and now have standing in court only by virtue of sec. 503. A *lis pendens* notice does not of itself and apart from the rights sought to be established in the litigation creat a lien upon the property involved. 21 Am. & Eng. Ency. Law (2d ed.), 654. See subdivision X. This is also in line with the announcement of our court in *McCutchen* v. *Miller, supra.* The purpose of the statutes must not be overlooked. What is that purpose? Why, merely to provide a means of advertising that there is a case in which *lis pendens* applies, advertising the *lis pendens* only when it had become effective; otherwise there would be no use for it.

TRULY, J., delivered the opinion of the court.

On February 5, 1902, the Fernwood Lumber Company, holding an unsecured debt against one J. H. Greene, a citizen of the state of Iowa, filed a creditors' bill in the chancery court, by virtue of the provisions of § 503, Code 1892, against said Greene and wife and one B. F. Thomas, also a non-resident, seeking to have canceled, as against its rights, a certain deed executed by said Greene and wife to Thomas, purporting to convey certain lands in Lauderdale county, this state. This deed, the bill of complaint averred, was fraudulent, collusive, and intended to hinder complainant in the collection of its just debt. The prayer of the bill was that complainant "have a personal decree against said J. H. Greene for the amount of the indebtedness, and that said lands pretended to be conveyed to said B. F. Thomas be condemned to be sold to pay the same, and, to this end, that proper process and publication issue and be made for said defendants." On the same day complainant filed and had

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entered upon the *lis pendens* docket a notice in conformity with § 2783, Code 1892. On the 15th day of February publication was made for said non-resident defendants as prayed by the bill, and on the 20th of the same month a copy of summons was mailed to each of defendants as directed by statute. On the 10th day of February, 1902, as the result of previous negotiations, B. F. Thomas executed to James Meehan a deed conveying in fee simple the lands in question for a cash consideration of $1,200. This deed, with the draft for the purchase money, was forwarded through one of the banks of the city of Meridian to the purchaser, the purchase price was paid, and the deed actually delivered on the 18th day of February, 1902. The record discloses that Meehan, the purchaser from Thomas, was ignorant of the claim of the Fernwood Lumber Company against Greene, and had no actual notice that a bill of complaint had been filed or a notice placed upon the *lis pendens* docket. The suit instituted by the Fernwood Lumber Company against Greene and Thomas progressed regularly to its conclusion, and resulted in a decree granting complainant a judgment against Greene for the amount of its debt, and directing a cancellation of the deed from Greene and wife to Thomas, and subjecting the land in question to sale for the satisfaction of said indebtedness. When the land was advertised for sale under the direction of said decree, the Meehan-Rounds Lumber Company, which had acquired title by conveyance from James Meehan, learning of said proposed sale, filed its bill in the chancery court, prayed for and obtained an injunction forbidding said sale, and upon final hearing obtained a decree making said injunction perpetual. From that decree the Fernwood Lumber Company appeals.

The decision of this controversy necessitates a consideration of the provisions of § 503, Code 1892, under which appellant instituted its original suit. By virtue of that statute the creditor who has or has not obtained a judgment at law may file his bill to set aside fraudulent conveyances of property, or other devices resorted to for the purpose of hindering or delaying or

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defrauding creditors, and may subject the property to the satisfaction of his demand. In such case, by operation of law, a lien is created in favor of the creditor upon the property described in his bill of complaint, from the filing thereof, "except as against *bona fide* purchasers before the service of process upon the defendant in such bill." In the instant case, therefore, the Fernwood Lumber Company, by filing its creditors' bill, established a lien upon the land in controversy from the date of such filing against all persons except *bona fide* purchasers, and as to such purchasers it also had a lien from and after the service of process upon the defendants. As the purchasers from Thomas (appellees here) occupy the attitude of *bona fide* purchasers for value, it becomes necessary, in order to determine which has the prior claim on the land, to ascertain when process is served upon a defendant to a bill of complaint. It must be noted that all parties made defendants to the original bill of complaint were non-residents of the state, and, as to such, service of process can only be had by publication in the manner and for the time prescribed by statute. The answer to the inquiry is found in § 3421, Code 1892, which expressly provides the manner in which publication for a non-resident defendant shall be made, and recites, after giving the form to be used: "Upon proof of publication of such summons for three weeks in some newspaper published in the county, and of the mailing of a copy of the summons to the defendant at his postoffice, where that is stated, the defendant may be thereafter proceeded against as if he had been personally served with a summons in the case in this state." This statutory provision is controlling upon this branch of the present discussion. The language is unambiguous, the meaning manifest. The defendant can be proceeded against as upon personal service had, only after the completion of the publication for the required number of times, and the mailing of a copy of the summons to his postoffice address, when the same is stated. In the case at bar the Meehan-Rounds Lumber Company acquired title by absolute conveyance for an adequate

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consideration while acting in perfect good faith, and in total ignorance of the pendency of any suit, prior to the completion of the publication, and before any notice thereof had been mailed to the non-resident defendants. Being a "*bona fide* purchaser before the service of process upon the defendant in such bill," it falls within, and is protected by, the exception stated in sec. 503 *supra.*

But it is contended by counsel for appellant that, conceding this to be true, when sec. 503 is considered as standing alone, the rule announced by that section is now modified, if not abrogated, by ch. 85, Code 1892. We think this position untenable. The history of sec. 503, as disclosed by the previous adjudications of this court, demonstrates that it was intended to protect creditors against the fraudulent devices of their debtors and to defeat fraudulent conveyances of property designed to prevent the collection of just debts. This statute was enacted to render ineffective and unavailing all fraudulent and collusive conveyances made prior to the institution of a suit, and to prevent divestiture of title subsequent to the filing of the bill by which it was sought to subject the property to the payment of an existing debt, whether the same had been reduced to judgment or not. Section 503 was designed for the protection of those creditors who have no lien upon, right to, or interest in land; while ch. 85, Code 1892, was enacted for the benefit of those entitled to such interest, lien, or right by virtue of some secret equity, some undisclosed claim, or founded upon or evidenced by some unrecorded instrument. A creditors' bill filed under the provisions of sec. 503 is an effort to restore the title of the property involved to his debtor, who had fraudulently divested himself thereof, and which would, but for such fraud, have been subject to his debt. Successful in this, the law creates for him a lien upon the land in controversy, which relates back, as to other creditors and third persons in general, to the filing of the bill, and, as to *bona fide* purchasers, to the service of process upon defendant. Chapter 85 affords

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a simple plan whereby those persons who, at the date of the institution of the suit, are vested with, or legally entitled to, a lien upon, right to, or interest in real estate, may protect themselves from subsequent divestiture of title to their detriment. The two statutes relate to entirely different and distinct classes of litigants. To make this more manifest, sec. 2786 provides that, if the person beginning any of the suits dealt with by ch. 85 shall fail to have the required notice entered upon the *lis pendens* docket, such suit "shall not affect the rights of *bona fide* purchasers or incumbrancers of such real estate, unless they have actual notice of the suit or levy." By this section protection of litigants who seek to take advantage of ch. 85 is made to depend upon the due filing of the notice therein authorized. By sec. 503 this protection is afforded after the service of process upon the defendant, without regard to the filing of any *lis pendens* notice and without reference to the knowledge or actual notice of the purchaser or incumbrancer. It is manifest, therefore, that the appellee, having purchased in good faith, for an adequate consideration, before service of process upon the defendant, must be protected in its title.

As not being necessarily before the court for consideration, we intimate no opinion as to when a suit is begun, within the purview of ch. 85, or from what date a *lis pendens* notice properly filed thereunder takes effect.

The decree is affirmed.

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WALTER A. HILLEY v. WESTERN UNION TELEGRAPH COMPANY.

1. **TELEGRAPH COMPANY.** *Messages. Delay in transmission. Damages. Forwarding order.*

   The negligent failure by a telegraph company to transmit a message ordering another message to be forwarded to plaintiff, whereby he failed to be notified of the condition of his sick child, does not entitle plaintiff to recover the cost of a railroad journey to see the child, since he could have learned the condition of the child by another message.

2. **SAME.** *Penalty. Code* 1892, § 4326.

   Code 1892, § 4326, imposing a penalty on telegraph companies for transmitting a message incorrectly or for unreasonable delay in the delivery of a message after its transmission, does not apply to a case of failure or delay in transmitting.

FROM the circuit court of Warren county.

HON. GEORGE ANDERSON, Judge.

Hilley, the appellant, was plaintiff, and the telegraph company, the appellee, defendant in the court below. From a judgment in defendant's favor the plaintiff appealed to the supreme court. The opinion states the facts of the case.

Hudson & Fox, for appellant.

Is appellant entitled to recover of appellee the penalty of twenty-five dollars imposed by § 4326, Code 1892?

The usual route for sending messages from Meridian to McComb City was by way of New Orleans through a relay office. The message in question was sent to the relay office at New Orleans, but was never transmitted from that office to McComb City, and consequently was never delivered to the sendee.

The penalty is inflicted for a failure "to transmit correctly and deliver the same within a reasonable time to the person addressed." Then the question is this: What must appellee do in order to avoid the penalty? And sec. 4326 of the code says ap-

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pellee must do this, and all of this: "Transmit correctly and deliver the same within a reasonable time" to the person addressed.

Whenever appellee fails to perform any one of the constituent parts of this command, it is liable to the penalty. If it should deliver the message to any other than the person addressed, it would be liable. When it fails to "transmit correctly," it is liable. *Wilkins* v. *W. U. Tel. Co.*, 68 Miss., 6. It is liable for a failure "to deliver within a reasonable time." *Tel. Co.* v. *Pallotta,* 81 Miss., 216. If it should fail to deliver it to any person, it would be liable.

Appellee is in the anomalous position of confessing that it has failed to do anything and everything, without exception, which sec. 4326 says it must do or pay the penalty, without pleading any excuse whatever, and still denying its liability. And its grounds for denying liability are that its failure of its duty to appellant, as laid down in sec. 4326, was total instead of partial.

Smith, Hirsh & Landau, for appellee.

The plaintiff is not entitled to the statutory penalty, because the delay complained of was not in the "delivery," but was in the "transmission," of the message from Merdian to McComb City, and because the message was an "interstate" telegram, and not within the operation of § 4326, Code 1892.

"Code 1892, § 4326, imposing a penalty on telegraph companies for failure to transmit correctly and deliver telegrams within a reasonable time, does not apply to a case of delay in transmitting." *Marshall* v. *W. U. Tel. Co.,* 79 Miss., 154. This case is followed and cited in *W. U. Tel. Co.* v. *Hall,* 79 Miss., 623; *W. U. Tel. Co.* v. *Pallotta,* 81 Miss., 216.

The case of *W. U. Tel. Co.* v. *Jones,* 69 Miss., 658, which was decided under the acts of 1886, and not the code of 1892, has no application here, so far as it permitted the plaintiff there to recover the statutory penalty.

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"A state statute undertaking to impose a penalty on a telegraph company for delay in transmission of a telegram from one state to another interferes with interstate commerce within the meaning of sec. 8, art. 1, of the Federal constitution, empowering congress to regulate commerce among the states." *Marshall* v. *W. U. Tel. Co.*, 79 Miss., 154; *W. U. Tel. Co.* v. *Alexander*, 66 Miss., 161; *W. U. Tel. Co.* v. *Pendleton*, 122 U. S., 347.

The plaintiff was not entitled to the special damage claimed, because there was nothing on the face of the message to inform the telegraph company that such damages would probably result from a failure by the said company to deliver the message. The damage claimed is too remote, because, even had the telegram been delivered, appellee would have gone to Sugar Valley and would have incurred the identical expense sued for, and because, by sending a message direct to his wife from Vicksburg, plaintiff could easily and cheaply have learned the condition of his child.

CALHOON, J., delivered the opinion of the court.

Mr. Hilley was a commercial traveler, with his home at Sugar Valley, Ga., where his family was, and, as part of it, a sick child. On August 11, 1903, being at Meridian, Miss., he wired his wife at Sugar Valley: "Wire me, McComb City, Miss., how sick are." Mrs. Hilley promptly received this message, and on that day, August 11th, wired him, directing the message to McComb City, "Sick are no better;" and this message was duly transmitted to McComb City, but not delivered, because Mr. Hilley was not there. In fact, after wiring this dispatch to his wife, he had an order to go to Vicksburg, and so could not go to McComb City. Because of this change in his itinerary, he, on that same August 11th, wired appellee's manager at McComb City: "Forward all telegrams for me to Vicksburg, Miss." This message is the cause of the trouble. It was the custom of the company, un-

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known, however, to appellant, to send dispatches from Meridian to McComb City by way of New Orleans, La., as the most expeditious and convenient way on their line, New Orleans being a relay station and repeating the messages. But in this instance, by some oversight, it did not repeat the message in question to McComb City. In this situation Mr. Hilley, anxious about his child, went often, on August 12th, to the Vicksburg office to inquire for the telegram he had ordered forwarded, but, of course, there was none there, and, instead of wiring from that office direct to Sugar Valley, as he might have done to relieve his uneasiness, he took a train and went there. He claims the expenses of that journey to and fro, to which we do not think he is entitled, as part of his actual damages, and also for the statutory penalty under Code 1892, § 4326. The court below refused both, and gave him judgment for only the cost of his telegram to the manager at McComb City, which was not repeated from New Orleans. The refusal of the expenses of his journey is assigned as error, but not urged in the brief of counsel for appellant, which is confined to a very perspicuous and strong argument that their client is entitled to the penalty. But this court is thoroughly committed to the view that the statute "limits the penalty as to transmission to transmitting incorrectly." *Marshall* v. *Telegraph Co.,* 79 Miss., 162 (27 South., 614; 89 Am. St. Rep., 585); *Telegraph Co.* v. *Hall,* 79 Miss., 623 (31 South., 202); *Telegraph Co.* v. *Pallotta,* 81 Miss., 216 (32 South., 310). We do not decide whether or not, in the particular case before us, the statute is unavailable because an interference with interstate commerce, as argued by counsel for appellee on the basis of *Marshall* v. *Tel. Co.,* 79 Miss., 154 (27 South., 614; 89 Am. St. Rep., 585); *Alexander* v. *Telegraph Co.,* 66 Miss., 161 (5 South., 397; 3 L. R. A., 71; 14 Am. St. Rep., 556); *Hanley* v. *Ry. Co.,* 187 U. S., 617 (23 Sup. Ct., 214; 47 L. ed., 333); and other cases.

Affirmed.

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PERCY E. QUIN ET AL. v. PHILIP HART ET AL.

1. INTERPLEADER. *Chancery practice. Injunction.*

Though relief by injunction be asked therein, a bill by debtors to ascertain to whom their debt should be paid is a bill of interpleader, and the rights of parties should be treated accordingly.

2. SAME. *Payment into court.*

A complainant in a bill of interpleader is not entitled to relief by injunction when he has paid nothing into court.

FROM the chancery court of, first district, Hinds county.

HON. ROBERT B. MAYES, Chancellor.

Appellants, Percy E. Quin and the Jackson Steam Laundry & Bath Company, filed the bill in this case in the chancery court of the first district of Hinds county against Philip Hart, Louis Bendat, and I. Forcheimer, in which they allege: That on the 21st day of September, 1903, Percy E. Quin, individually and as president of the Jackson Steam Laundry & Bath Company, executed a note for $3,990, payable to Louis Bendat or bearer, due January 6, 1904, which was secured by deed of trust to Philip Hart, as trustee, on the property of the Jackson Steam Laundry & Bath Company; that $3,300 of said note was for thirty-three shares of stock owned and held by said Bendat in said corporation; that, on the payment of the note of $3,990, the stock was to be delivered and transferred to P. E. Quin; that on December 5, 1903, Bendat ostensibly transferred said note to I. Forcheimer, and, when the note became due, complainant, Quin, was unable to ascertain the real owner of it; that said shares stand on the books of the Jackson Steam Laundry & Bath Company in the name of L. Bendat, and, according to the charter of that corporation, the stock is still the property of Bendat until it is transferred on the books, and, since Bendat disclaimed ownership of the note, complainant could not with

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safety pay it, because Forcheimer had no authority to transfer the stock; that it was a scheme of Bendat to enforce a double payment of the $3,300 on the note, because when Quin paid the note he would not be the owner of the stock; that on February 4, 1904, the McComb City Bank filed a bill in the chancery court of Pike county, making L. Bendat, I. Forcheimer, and P. E. Quin, individually and as president of said corporation, defendants, whereby Bendat is sued for $2,000, and the indebtedness said to be due him by complainants is sought to be made liable therefor, and said thirty-three shares of stock in said Jackson Steam Laundry & Bath Company asked to be decreed to be the property of Bendat, and that same be subjected to the payment of said indebtedness. A copy of that bill was made an exhibit to the bill. Complainant further alleged that after service of process in the Pike county suit, with the willful and wanton attempt to hamper the business of complainants, Bendat had the trustee in the deed of trust, Philip Hart, to post notices of the sale of the property under the deed of trust; that, of the $3,990, $3,300 was due for the thirty-three shares of stock, and only $690 was due to Bendat for services; that complainant Quin is able and willing to pay the entire note, but cannot safely pay it, because of the fact that he does not know to whom it belongs; and that the foreclosure by Hart would work an irreparable injury to said complainant. The prayer was for an injunction restraining Philip Hart from making the sale under the deed of trust. The injunction was issued in accordance with the prayer of the bill. Hart answered, admitting the execution of the trust deed, and that the note was dated and payable as alleged, and, as further security for the payment, Bendat was to retain the shares of stock; and alleged that he had no other interest in the suit than that of trustee. Bendat answered, admitting the execution of the note and trust deed as alleged; admitted that $3,300 was for the purchase money of the shares of stock, and the balance was for salary due him; that he was to retain the shares of stock until the

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note was paid, and that on payment the stock was to be transferred to said Quin; but alleged that the note was not paid at maturity, and prior to its maturity he sold it to I. Forcheimer for value; and that upon payment the shares of stock would be transferred. He denied that he was seeking to have a double payment of the note. I. Forcheimer answered, setting up that he was the true owner of the note, having bought it before maturity; denied all the allegations of fraud charged in the bill; and denied any knowledge of the transactions between the bank and Bendat. The McComb City Bank was not made a party to this suit, and Quin did not pay the money admitted to be due by him into court. On this bill and answers affidavits were taken, and, on the hearing of a motion to dissolve, they were read. The motion to dissolve the injunction was sustained, and complainants appealed.

Green & Green, for the appellants.

The appellant, Quin, admits that he owes the note, and it is not disputed that he is amply able to pay it; but Quin is now a garnishee, the amount due on the note has been impounded in his hands, and a proceeding *in rem* is now being waged to condemn it and his control thereof entirely divested. There are two adverse claimants to the fund, each claiming the entire amount due by Quin; and Quin stands garnisheed at the suit of one of them, and, so far as the law is able to do, Quin will be compelled to respond to the bank if it is successful, and Forcheimer is now proceeding to collect the amount due on the note by foreclosure on property in which Quin owns a main interest.

Quin is only liable once and has been garnisheed in the chancery court of Pike county, and now requests that his garnishment in that court be protected by a decree substantially similar in its essential elements to a bill of interpleader. *Preston* v. *Harris*, 24 Miss., 247; *Moffat* v. *Loughridge*, 51 *Ib.*, 215.

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When the writ of garnishment was served on Quin, it operated under the law as a transfer assignment to the McComb City Bank of whatever interest Bendat then had therein upon the condition that the bank successfully prosecuted its suit; in short, it was a conditional assignment of which Quin had notice and operated to divest by an act of the law any control he had thereof by and through no act of his, and a garnishee will be protected, as he stands as a trustee and entitled to the aid and guidance of the chancery court as such. As said in *Oldham* v. *Ledbetter,* 1 How., 43, in the syllabus: "The garnishee is regarded by the law in the character of a trustee; and as such it is his duty to take legal and appropriate steps to protect the rights of all parties to the goods or effects attached in his hands. If, after notice, though execution may have been awarded against him, he satisfy the judgment, it will be in his own wrong, and will constitute no valid defense to the claim." Moreover, in *Henderson* v. *Garrett,* 35 Miss., 554, it was held that a judgment debtor, who has been summoned as a garnishee, may maintain a bill of interpleader against the plaintiff and the person suing out the garnishment; and he is entitled to an injunction until the rights of the parties are adjudged and settled.

Doubtless appellee will contend that while it was competent to file the bill of interpleader this necessarily presupposes an actual payment into court of the fund. But why? In the instant case there is now depending this McComb City Bank suit, wherein the necessary parties are not joined and are now litigating *inter se* the relative rights of each, and your orator, the debtor, has to supinely sit by to await the outcome, and meanwhile allow Hart, the trustee, to sell the property.

The suit is now progressing, the rights being determined, and when determined in this suit they will be binding. Appellant only desires that until this suit be determined he should not needlessly be exposed to the double payment. The hardship of this stands admitted in the pleadings by the defendant him-

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self. The relative rights will soon be determined duly and orderly between the bank and Forcheimer, and no further suit is necessary for that purpose; it would only entail useless expense. We could not proceed by filing a cross-bill, because P. Hart, trustee, is no party to the McComb City Bank suit.

The only thing requisite for the protection of appellant is that the lien be not enforced until it shall be determined to whom the fund is payable—the precise issue now being tried in Magnolia; but to make the relief at all effective, it is requisite that until that issue shall be determined the property securing the note shall not be sold under the power, by a party whose every right to the fund is now being questioned, and which has passed by virtue of the law itself as a conditional assignment to the bank dependent for its validity upon the determination of a condition subsequent—namely, the determination of a condition as to whom the fund belongs. The injunction we ask is merely ancillary, auxiliary to the main suit, and will endure only until the final termination, until appellant can act with safety. 16 Am. & Eng. Ency. Law (2d ed.), 372; 1 Smed. & M., 555.

Robert Lowry, and *Harper & Potter,* for the appellees.

1. The only aspect in which the bill can be maintained is as a bill in the nature of a bill of interpleader, and appellants here distinctly seek to support and sustain it as such, and cite the case of *Preston* v. *Harris,* 24 Miss., 247, in its support. We concede that this is the only view in which the bill can be maintained, if at all; but the bill as a bill of interpleader must fail for several reasons. It is of the very essence of any bill in the nature of a bill of interpleader that both claimants to the fund must be made parties defendant in order that the controversy between them can be settled in one and the same suit. Yet this bill wholly fails to make the McComb City Bank a party, and leaves the bank and its garnishment proceedings in Pike county without molestation. We insist that the proper

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proceeding in this case would have been for Quin to have brought this whole matter to the attention of the chancery court of Pike county, where the whole matter might have been determined. But if it be true, as claimed by appellants, that all of the necessary parties were not parties to the suit in Pike county, then certainly it was necessary to have brought in all of the necessary parties in the suit in Hinds county. Clearly the bill is totally defective in leaving out one of the claimants to the fund in question.

2. Again, from the very earliest days, the foundation upon which any bill in the nature of a bill of interpleader rested, and must rest, was that while the complainant admitted a debt or duty, but did not know to whom of two persons he owed it, and invoked a court of equity to bring the two parties into court, in order to determine between them, at the same time it was required that the complainant must offer to perform the duty, or must tender the property, funds, or debt into the custody of the court for its disposition. And from time immemorial this tender of the funds into court has been held to be a condition precedent, a *sine qua non,* to any further procedure in the case. More than that, the complainant must swear that there was no collusion between the parties for the purpose to delay the collection of the debt. 2 Story's Eq. Jur., sec. 809; 2 Daniel's Chancery Practice, 1671.

That all proceedings in the nature of an interpleader require that the fund in dispute must first be paid into court seems to be fully recognized by our jurisprudence, as indicated by § 2143, Code 1892, where the procedure in the nature of interpleader is adapted to and authorized in courts of law in certain instances. *Kellogg* v. *Freeman,* 50 Miss., 129.

Argued orally by *Gurner W. Green,* for appellants, and by *Robert Lowry* and *W. R. Harper,* for appellees.

WHITFIELD, C. J., delivered the opinion of the court.

The bill in this case must be treated as a bill of interpleader;

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and as nothing was paid into court by the complainant, the action of the court below was correct in dissolving the injunction. But the court should not have stopped short with the mere dissolution of the injunction. The case is a peculiar one in some of its aspects. The bill filed by the McComb City Bank distinctly counts upon the fact that the thirty-three shares of stock were standing upon the books of the corporation still registered to Bendat as owner, and, for this reason, that said stock be decreed to be Bendat's, and sold, as such, to satisfy his debt to the McComb City Bank. In addition to this, it also alleges fraud in the sale of the note from Bendat to Forcheimer, as to which last contention, however, so far as this motion is concerned, the evidence seems to have been with the appellee. We think the court, on the remanding of this case, should enter an order directing Quin to pay the amount of his note into the court, and directing the holder of the thirty-three shares of stock to deposit them with the clerk of the court. In its order directing the money to be paid in and the stock to be deposited, the court below should provide further that, upon compliance with its order in these two respects, the injunction should be reinstated. The court below should then proceed to try the question as to whom the shares of stock belong, and as to the validity of the transfer between Bendat and Forcheimer, and all the other equities in the case. If, on the trial on the merits, it shall appear that Quin is entitled to the shares of stock, they should be delivered to him, and the money for the same be directed to be paid to the party appearing to be entitled. If, however, it should appear on the trial on the merits that the McComb City Bank is entitled to subject the stock to its claim against Bendat, then the money paid in by Quin, so far as represented by the value of the stock, should be returned to him. In this way the court will administer all the equities and control the direction of the stock and the payment of the money.

Affirmed, and remanded to be proceeded with in accordance with this opinion.

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Syllabus.

ALABAMA & VICKSBURG RAILWAY CO. v. MARGARET A. OVERSTREET ET AL.

1. MASTER AND SERVANT. *Railroads. Death of servant. Instruction. Evidence.*

In an action for death of an employe by the falling of a bridge timber on him while at work under the bridge, the court charged that if defendant's foreman directed another servant to go on the bridge and first take off the nuts on bolts in timbers in the bridge, used to hold said timbers safely, and to knock the bolts out of the timbers, "and then put ropes around the timbers and lower them, and that the doing of such acts were negligent," and the foreman was present when such negligent work was performed, and deceased lost his life from a piece of timber falling on him when it was being so removed, defendant was liable. Held, that in the absence of evidence fixing any order in which the taking off the nuts, the knocking out of the bolts, and the lowering of the timbers should be done, the instruction was prejudicially erroneous in the use of the words "first" and "then."

2. DIRECTION OF SUPERVISING AGENT. *Construction of testimony. Order of events.*

An order from a bridge foreman to one of his crew engaged in repairing a bridge to take off the nuts and knock the bolts out of a brace and get a line and lower it, is not negligent as to an employe at work under the bridge who is injured by the falling of the brace when left unsupported, since the direction cannot be construed as prescribing the order in which the several acts necessary to the lowering of the brace were to be done.

3. DAMAGES. *Future prospects.*

Where, in an action for death, there was no evidence as to decedent's prospects for the future, or as to his expectancy of life, a charge authorizing the jury, on the issue of damages, to consider deceased's physical condition at the time of his death, the wages he was then earning, and his future prospects, and the probable length of his life, was error.

4. CUSTOM. *Evidence.*

In an action for death of a servant by the falling of a bridge timber, refusal to permit defendant to introduce evidence as to the custom in lowering such timbers was error.

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Statement of the case.

FROM the circuit court of Newton county.

HON. JOHN R. ENOCHS, Judge.

This was a suit for damages for the death of T. R. Overstreet, alleged to have been wrongfully caused by the railway company. Deceased was the husband of the plaintiff, Margaret A. Overstreet, and the father of the other plaintiffs. It is charged in the declaration that deceased was killed through the negligence of a superior officer or servant of the railway company; that the decedent was an employe of the company, being a member of a bridge crew; and that at the time the fatal injuries were received he was engaged, with other members of the crew, operating under the orders of the foreman, in building a bridge, and he received the fatal injuries by the falling of a large piece of bridge timber upon him, which fell because of the negligence of the superior officer, or foreman, who had the right to control decedent and his fellow-servants. The testimony for plaintiffs was that decedent at time of the injury was a healthy, sound man, thirty-five years old, and earning $1.50 per day; that he had no property, and left his widow and children dependent on her father for support; that decedent and several others were engaged at work on the ground under the bridge when the foreman came up and told two other workmen, Babbington and Briggs, to go upon the bridge and remove some braces, in order to move a bent that was desired removed, which they were doing, and had taken the bolts out of one brace and lowered it, and were working at another brace, the bolts having been taken out of it, when it fell and struck Overstreet, who was at work under the bridge, and killed him. Some of the witnesses testified that Hall, the foreman, instructed Babbington to go on top of the bridge and line the braces and take off the nuts, knock out the bolts, and then lower the braces with a line. Babbington testified as follows: "He (Hall) told me to take off the nuts and knock out the bolts and get a line and lower them." Most of the witnesses said that Hall was present when the first brace was removed, and saw the way it was being done. Some

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said he was still present when the second one was being removed, and very near when it fell. Others said Hall was some distance away at the time the brace fell. Babbington testified that he did the work just as Hall told him to do it. Simpson, a witness for defendant, was asked by defendant's counsel what the custom with the gang was with reference to taking down braces. Plaintiffs objected to this question, and the court sustained the objection, to which defendant excepted. Two witnesses for plaintiffs had testified as to this custom. The instructions given for plaintiffs, objected to by defendant, are set out in the opinion of the court. There were verdict and judgment for plaintiffs for $10,000. Defendant's motion for a new trial was overruled, and it appealed to the supreme court.

McWillie & Thompson, for appellant.

1. To hold that railroad employes who are not engaged in the operation of the railroad, but in doing work which other persons and corporations do, are within the terms of sec. 193 of the constitution of 1890, and the statutes of the state (Code 1892, § 3559; Laws 1896, p. 97; Laws 1898, p. 82), would render these provisions violative of the Federal constitution, in that it would be depriving the railroad corporations of their property without due process of law, and denying to them the equal protection of the laws, as guaranteed by the fourteenth amendment to the constitution of the United States. The foreman of the bridge crew, because they were mere bridge builders or repairers, was a fellow-servant of the deceased, and the demurrer to defendant's third plea should have been overruled.

2. The first instruction for plaintiffs is erroneous, because it is not predicated of the testimony. The only evidence which can be claimed, with even a shadow of reason, as supporting the instruction, is the testimony of Babbington as to what Hall directed him to do. Babbington's testimony is that Hall instructed him "to take off the nuts and knock out the bolts and get a line and lower the brace." The instruction practically

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told the jury that this was sufficient evidence to justify a finding that Hall required the procedure to be in the order of events named or that he intended the work to be executed in that order, without any proof of either.

The defendant was certainly entitled to have the witness, Simpson, testify touching the custom in taking down braces, and it was error in the court below to sustain the plaintiffs' objection thereto. The error is not cured by the fact that the custom was fairly well proved by the plaintiffs through other witnesses. The defendant had the right to prove it beyond dispute or misunderstanding, which it no doubt could and would have done by Simpson had not the court prevented.

The fourth instruction for plaintiffs is erroneous in telling the jury that if they believe from the evidence that plaintiffs are entitled to recover they may consider (going away from the evidence) (1) decedent's physical condition, (2) the wages he was earning at the time of his death, (3) his future prospects for earning money and accumulating property, and (4) the probable length of the life of decedent, in fixing the amount of damages. The jury were not at all restricted to the testimony after determining that the plaintiffs were entitled to a recovery, but were then turned loose in estimating damages and authorized to act on their own knowledge or conjectures. *Yazoo, etc., R. Co.* v. *Smith,* 82 Miss., 656. There is not one particle of evidence showing or tending to show decedent's "future prospects for earning money and accumulating property," and there was no testimony (unless it could be inferred from his age and state of health by the jurors from common knowledge) of the probable length of decedent's life had he not been killed.

Ethridge & McBeath, for appellees.

1. Some of the witnesses say that Mr. Hall, foreman, instructed Babbington to go on top of the bridge and line the braces and take off the nuts, knock out the bolts, and then lower them with

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a line. Babbington, the man selected to do the work, and other witnesses say that Babbington was told to go on top and take off the nuts, knock out bolts, and then line and lower the braces. All agree, who undertake to locate Hall when the first sash or braces were lowered, that Hall was personally present when the first sash or brace was removed, and saw the way this was being done, and the brace or sash that fell and killed Overstreet was being removed the same way; that the only support to the braces or sashes after bolts were knocked out was the old spikes driven in the braces or sashes when first put up. The first brace held and was safely lowered; the other, or second, fell, killing Overstreet.

The first instruction for plaintiff was properly granted. Babbington says in answer to questions put to him as to what was depended upon to hold the timber after the bolts were taken out of the timber, "That there were spikes in the timber which they depended upon after the nuts were taken off and bolts knocked out, and that the first was taken off this way," and that Hall, the foreman, was present when this was done, and Otto Stevens says Hall was present and within four or five feet of where the timber fell. Here is Babbington's statement as to his directions how to do the work from Hall in answer to the following question: "When you were engaged there in that work, how did Foreman Hall direct you to lower the brace?" Ans. "He told me to take off the nuts and knock out the bolts and get a line and lower them." Then on cross-examination he reiterated this statement; and in further answering the attorney for appellant further on, the following question being propounded to him, "Why did not you use the rope as Mr. Hall told you in lowering the second one?" he says: "I was doing just like I had been doing all the time." Hall was present and saw how he was doing, and he knew that he, Babbington, was knocking bolts out and depending upon "old spikes" to hold the braces until a rope was put on them to lower.

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Brief for appellees.

2. The demurrer to defendant's third plea was properly sustained. This plea set up the unconstitutionality of § 3559, Code 1892, and this was met by demurrer of plaintiffs. The plea is no defense to the action, and the court properly so held. Section 3559 is not repugnant to the fourteenth amendment of the constitution of the United States. It is in the language of sec. 193 of the constitution of the state, and is not special legislation.

3. The question for the jury was not the custom in doing this sort of work, and testimony of this character was properly excluded. It may have been the custom to negligently do the work, this would not relieve them. The court did not permit this fact to be shown by a number of witnesses for appellant over the objection of appellee's counsel. This question was put to Babbington and numbers of others. In his answer, on cross-examination by appellant, Babbington said: "I was doing just like I had been doing on the rest."

4. The contention of the appellant as to the fourth instruction is not tenable. The instruction does not in any way conflict with the case of *Yazoo & Mississippi Valley Railway Co.* v. *Smith,* 82 Miss., 656. The jury are not told that "Then the defendant is liable in damages in such sum as the jury shall see fit to assess under the instructions of the court as given for plaintiff," but are told, "If the jury believe by a preponderance of the evidence that plaintiffs are entitled to recover in this suit, they may take into consideration the physical condition of the deceased at the time of his death, the wages he was then earning, and his future prospects for earning money and accumulating property, and the probable length of life of deceased, in fixing the amount of damages." Now, then, this instruction, with the preceding instruction, clearly announces the law on the subject of damages. It is true, we might have asked to have the jury instructed as to the damages, present value of his life, etc., but this in no way transgresses any rule of law laid down by this court, certainly not by the decision heretofore referred to.

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5. Hall was not a fellow-servant of Overstreet, and the fifth instruction so told the jury. He was the superior officer or agent of appellant. *Cheaves* v. *Railway Co.,* 82 Miss., 48; *Gal., H. & L. A. Ry. Co.* v. *Ford,* 46 S. W., 77; *Houston & F. C. Ry. Co.* v. *Stewart,* 48 S. W., 799; *C., H. & D. R. Co.* v. *Morgrat,* 37 N. E., 11; *Union Pac. Ry. Co.* v. *Doyle,* 70 N. W., 43 (s.c., 50 Neb., 555); *Rutherford* v. *So. Ry. Co.,* 56 S. C., 446 (s.c., 35 S. E., 136); *Pierce, Receiver,* v. *Van Dusen,* 78 Fed., 693; *C., H. & D. R. Co.* v. *Thibaud,* 114 Fed. Rep., 918; *Taylor* v. *Bradford,* 83 Miss., 157.

WHITFIELD, C. J., delivered the opinion of the court.

The instruction No. 1 for appellees is in these words: "The court instructs the jury that if they believe from the evidence, by preponderance thereof, that Hall, the superior agent of defendant, directed Babbington to go upon the bridge of defendant, and to first take off the nuts of certain bolts screwed on bolts then in pieces of timber in said bridge, used for the purpose of holding safely said timber, and to knock said bolts out of the said heavy pieces of timber, and then put ropes around the timbers and lower them, and that the doing of said acts were negligent; that said Hall was present when said negligent work was performed; and that T. R. Overstreet lost his life from a piece of timber falling on him and producing the wounds that caused his death when said timber was being so removed—the defendant is liable, and the jury should so find." There is no warrant in the testimony for the use of the words "first" and "then" in this instruction. The testimony does not fix any order in which the three things were to be done. The instruction is clearly erroneous for this reason. It is insisted that this instruction is also erroneous as assuming that Hall was present when the brace which killed Overstreet fell. But there is testimony both ways on this point, and the jury settled the facts.

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The fourth instruction is in these words: "If the jury believe by a preponderance of the evidence that plaintiffs are entitled to recover in this suit, they may take into consideration the physical condition of deceased at time of his death, the wages he was then earning, and his future prospects for earning money and accumulating property, and the probable length of the life of deceased, in fixing the amount of damages." There is no testimony whatever as to Overstreet's prospects for the future, his future accumulations of property, or as to his expectancy of life—absolutely none. Learned counsel for appellees, in their brief, say that his expectancy was thirty-two years. If there was any evidence to this effect in the court below, it is omitted from this record. We are bound by the record, and the instruction is fatally erroneous. The jury had no standard by which to fix damages.

It was error, also, to refuse to allow appellant to prove, if it could, by Simpson and others, what the custom was as to lowering braces. The error is more noticeable since two witnesses for appellees had been allowed to testify to the custom. The question to Babbington as to what he "expected to hold the brace" when the bolts should have been knocked out was not in proper form. It would be competent to show what, as a fact, could hold them, but not what he expected would hold them.

We do not consider the constitutional question involved, because of the well-settled canon that such questions will not be decided save when necessary to decision. What we have said points out sufficiently the errors to be avoided on a new trial.

Reversed and remanded.

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JOSEPH WATT FUGATE v. STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Murder. Jurors. Voir dire examination. Reasonable doubt.*

   A man's conception of a reasonable doubt is not a proper subject of inquiry when he is presented as a juror in a criminal case and examined on his *voir dire.*

2. SAME. *Estimate of witness.*

   Whether a proffered juror would believe a certain witness for the state on oath is not a proper subject of inquiry upon his *voir dire* examination in a criminal case.

3. SAME. *Evidence. Witnesses differing.*

   Where testimony touching a certain conversation with the accused, unquestionably relating to the deceased, is otherwise competent, it is not rendered inadmissible in evidence because the witnesses fail to corroborate each other in some particulars concerning it.

4. SAME. *Theories. Duty of jury.*

   The rule that where there are two reasonable theories as to the facts of a killing, one favorable and the other unfavorable to the accused, the jury are bound to accept the favorable one, only applies in case the jury be in doubt as to the correctness of the unfavorable cne.

5. SAME. *Instructions. Modifications. Harmless error.*

   Where the court instructed the jury in a murder case to the effect that the accused was presumed to be innocent, and that the presumption was an instrument of proof whereby his innocence was established until sufficient evidence should be introduced to overcome it, the erroneous modification of another part of the instruction, charging that the presumption of innocence is not merely a presumption of law, but is evidence in behalf of the accused, by striking out the word "evidence" and inserting "presumption," does not constitute reversible error.

FROM the circuit court of Prentiss county.

HON. EUGENE O. SYKES, Judge.

Fugate, the appellant, was indicted, tried, and convicted of the murder of one Ransom Cunningham, sentenced to be

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hanged, and appealed to the supreme court. [The case was heretofore in the supreme court on a former appeal and is reported, *Fugate* v. *State,* 82 Miss., 189.]

On the examination of one of the jurors on his *voir dire* during the last trial he was asked as to his conception and understanding as to what a reasonable doubt was. This question was objected to by the state, and the objection was sustained, to which exception was taken. Another juror was asked on his *voir dire* if he would believe one of the state's witnesses, Roscoe Hoard, on oath. This was objected to, and the objection sustained. The defense excepted, insisting that the juror had heard this witness say something about what defendant had stated in a conversation at Aberdeen to another witness (Moreland), and for that reason defendant was entitled to know whether this juror would believe Hoard or not, as the testimony would be very damaging if witness should believe Hoard.

On the trial the evidence for the state tended to show an unprovoked murder of Cunningham by appellant. This was shown especially by the dying declaration of deceased. There were no other eyewitnesses to the killing except the deceased and the defendant. Defendant's testimony was that he killed deceased in necessary self-defense, being first attacked by him with a heavy article of some kind.

The testimony of Moreland was as follows: "In April, 1902, I was in Aberdeen, and was going up the street, and came up with Joe Watt Fugate and Roscoe Hoard. Fugate was making a good deal of fuss and noise, and I told him he had better hush; that Mr. McKennie would get him; and he said, 'No, he would not,' and he used some cuss words, and said he had killed one man, and they knew it, and he could kill another one; and he walked on a little, and I asked him if he had ever hated about killing that man, and he said: 'No, not a damned bit more than a damned hog or dog.' " Did not remember all the conversation, but they talked of the killing of Ran Cunningham, and he said he aimed to kill him the evening he did kill him; that

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he did just what he aimed to do when he started over to Cunningham's house.

Roscoe Hoard testified that in April, 1902, he was in Aberdeen, and walking up the street with Joe Watt Fugate, and Mr. Jim Moreland came up, and he heard the conversation between Moreland and Fugate about Ran Cunningham. "Joe was talking and going on, talking out of the way; and Jim told him to hush; that Mr. McKennie would get him and put him in the cooler; and Fugate said no, he wasn't afraid of him, for he had killed one God damned man, and he would kill another, or something that way; and Jim said to him, 'Don't it never bother you about killing that fellow Cunningham?' and he said: 'No, it don't bother me any more than killing a hog or a dog.'" Did not recollect hearing him say anything about what his purpose was when he left home to go to Cunningham's house the day of the killing.

The twenty-sixth instruction as asked by defendant was as follows: "The court instructs the jury that if, after a careful consideration of the whole evidence in the case, there are two reasonable theories arising out of such evidence as to how the matter in controversy occurred, one favorable to the defendant and the other unfavorable, it is the duty of the jury to accept the theory favorable to the defendant, although the theory favorable to the state is more reasonable, and supported by the stronger evidence." The court modified this instruction by adding the words, "and the jury are in doubt which is the correct theory," after the word "unfavorable."

The twenty-eighth instruction, as asked, was as follows: "The court instructs the jury that the defendant is presumed in law to be innocent of the charge brought against him, and that this presumption of innocence is not merely a presumption of law, but is *evidence* in behalf of the defendant which he is entitled to have considered by the jury in reaching a decision in his case. In other words, this presumption is an instrument of proof created by the law in favor of one accused, whereby his

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innocence is established until sufficient evidence is introduced to overcome the proof which the law has created." The court struck out the word "evidence" where it first occurs in the instruction, italicized *supra,* and inserted the word "presumption" instead.

Boone & Curlee, for appellant.

The court below erred in not allowing defendant to examine juror Livingston on his *voir dire* examination as to his conception and understanding of a reasonable doubt, in order that he might intelligently exercise the right of peremptory challenge, and we contend that the defendant had a right to know what the juror considered a reasonable doubt, and whether or not said juror in making up his verdict would be influenced by the doubts that might arise in his mind as to which of the two accounts of the killing was the correct one. *Hale* v. *State,* 72 Miss., 144.

The court below erred in not allowing juror Roan to answer question of defendant's counsel as to whether or not he would believe witness Roscoe Hoard on oath. Upon the reading of the record in this cause the court will see that Hoard lived about a mile from the juror, and that he had spoken about the case to the juror, and had talked to the juror about the trip Roscoe Hoard made to Aberdeen, and spoke to him something or other about what occurred between the defendant Fugate and the said witness in Aberdeen. The court will also readily see that the testimony of Roscoe Hoard is very prejudicial to the defendant's interest before the jury.

The assignment of error based on the action of the court in modifying charge No. 28, as asked by the defendant, is well taken. The charge was correct as originally written. It was in this language: "The court instructs the jury that the defendant is presumed under the law to be innocent of the charge brought against him, and that this presumption of innocence is not merely a presumption of law, but is evidence in behalf of

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the defendant," etc. The court struck out the word "evidence" and substituted therefor the words "a presumption," which destroyed the whole effect of the charge upon the question of the presumption of innocence.

The supreme court of the United States, in the case of *Coffin* v. *United States,* 156 U. S., 460, uses this language: "The fact that the presumption of innocence is recognized as a presumption of law and is characterized by the civilians as a *presumptio juris* demonstrates that it is evidence in favor of the accused; for in all systems of law legal presumptions are treated as evidence, giving rise to resulting proof to the full extent of their legal efficacy." This expression in the Coffin case is reaffirmed in the case of *Agnew* v. *United States,* 165 U. S., 33.

W. M. Cox, and *William Williams*, attorney-general, for appellee.

The trial court did not err in refusing to permit appellant to examine juror Livingston as to his conception and understanding of a reasonable doubt. The language used in *Hale* v. *State*, 72 Miss., 140, is broad, but it must be construed with reference to the facts of that case. What appellant desired of juror Livingston was a definition or explanation of a reasonable doubt. Great lawyers and learned judges flounder hopelessly whenever they undertake to define or explain this phrase. This court, with tireless iteration, continues to animadvert upon all attempts to define or explain it; certainly the practice should not be tolerated of propounding such a question to the simple and the unlearned.

If this question should be allowed, jurors will next be asked for their conception and understanding of the presumption of innocence, of malice aforethought, or justifiable self-defense, of the burden of proof in criminal cases, the competency and weight of dying declarations, of confessions as evidence, etc.,

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and put through an examination as to the law of the case which none but the best lawyers could undergo with any credit.

Will not this court indulge the presumption that jurors, when found qualified, will heed the instructions of the court, as they make oath to do, and apply to the facts of the case the law as given them by the court, regardless of their own previous conceptions, or misconceptions, of the law? Is not this indispensable to the safety and purity of jury trials?

Nor did the court below err in refusing to permit appellant to ask juror Roan if he would believe witness Hoard on oath. If this question could be allowed, then each and every man presented as a juror could be asked as to the credit he would give to each and every witness, both for state and defense, in the case. The right of examination claimed would cause the crime being tried to be lost sight of and forgotten in the preliminary examination of jurors in all the subtleties and refinements of the law and in the trial of the credibility of witnesses. This would make our trials of crime mere travesties of justice. While adding nothing of any worth to the security and immunity of the innocent, it would make criminal trials more protracted and difficult, and the conviction of the guilty less certain.

If it be admitted that the court erred in modifying instructions twenty-six and twenty-eight for defendant, this cannot have prejudiced him on his trial before the jury. The instructions given for the state were few, simple, and incontestable. A great number of instructions, most skillfully drawn, and covering every phase of the defense, were given for appellant. Notwithstanding a possibly erroneous modification of two of them, the jury were furnished a sufficient guide for their proper determination of the case. The rule is correctly stated in *Mabry* v. *State,* 71 Miss., 722.

Instruction twenty-six as modified is a correct statement of the law, appellant's counsel themselves being the judges. Instruction twenty-five is much like twenty-six. In twenty-five the jury are told that if any fact or circumstance in the cause

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is susceptible of two reasonable interpretations, one favorable and the other unfavorable, and the jury is in doubt as to which is the correct interpretation, they will resolve such doubt in favor of the defendant. This is correctly stated. Why should not the jury be instructed also in twenty-six to accept of two reasonable theories on the whole case, the one favorable to defendant, if in doubt which is correct? The charge as amended is almost identical with twenty-five. By it the jury are directed to find for defendant if there are two reasonable theories and the jury has any doubt which is correct. How could defendant have been injured by such a charge?

If it was error to erase the word "evidence" and write "presumption" in its stead in instruction twenty-eight, this was fully cured in the latter part of the instruction, which declared that "The presumption is an instrument of proof created by the law in favor of accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created."

Argued orally by *J. M. Boone,* for appellant, and by *W. M. Cox,* and *William Williams,* attorney-general, for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

There was no error in refusing to allow defendant to examine the juror Emmett Livingston on his *voir dire* as to his conception of a reasonable doubt. Jurors on their *voir dire* examination are not to be led into the tangled mazes of this metaphysical field.

Nor was there any error in refusing to allow the juror Roan to answer the question, on his *voir dire* examination, "whether he would believe witness Roscoe Hoard on oath." The court permitted the testimony of Roscoe Hoard to go to the jury over the objection of the defendant, but the next day, upon the request of the state, excluded the testimony. Counsel for state took this action so as not to have possible error in the record. Their reason seems to have been that, whilst Roscoe Hoard cor-

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roborated in part the witness Jim Moreland as to the conversation had with defendant (which the reporter will set out in full), he did not corroborate him throughout; and, further, because they feared that it was barely possible that Hoard's testimony might fail of showing that Ran Cunningham, the deceased, was the specific person referred to by defendant. The record shows beyond dispute that Ran Cunningham was the specific person referred to, and it was not necessary to the competency of Hoard's testimony otherwise that he should throughout corroborate Moreland. The latter fact might have affected the credibility of the one or the other with the jury, but did not render the testimony incompetent. The only mistake made by the court below was in acceding to the request of the counsel for the state and excluding the testimony; but this was an error in favor of the defendant. It is obvious that, so far from prejudicing his case, the action of both the counsel for the state and the exceptionally able and accomplished trial judge was the result of extreme tenderness towards the defendant, and praiseworthy conscientiousness in seeking to secure to him every legal right.

The addition of the words "and the jury is in doubt which is the correct theory" to the twenty-sixth instruction asked by the defendant was not error. There being doubt as to the correct theory is submitted as the correct test by counsel for appellant in their twenty-fifth instruction, in which the jury are told that, if there "was any fact in the case susceptible of two reasonable interpretations, one favorable and the other unfavorable to the defendant, and the jury were in doubt which was the correct interpretation," etc.

It was erroneous in the court to change the first part of the twenty-eighth instruction asked for the defendant by striking out the word "evidence" and substituting therefor the word "presumption." But it was harmless error, for the latter clause of the instruction cures it. The jury could not have misunderstood the idea of the instruction as propounded originally.

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None of the other errors assigned on the trial of the merits is tenable. We have carefully considered the case in all its phases, and find no error of any kind except the one just alluded to in respect to the twenty-eighth charge, and this was cured as stated.

Affirmed.

JOSEPH WATT FUGATE v. STATE OF MISSISSIPPI.

CRIMINAL LAW. *Writ of error coram nobis. Bias of jurors.*

Where a proper case is made for a writ of error *coram nobis* it will lie in either a criminal or civil case, there being no statute to forbid; but the writ cannot be invoked in a criminal case for the purpose of annulling a final judgment of conviction by showing that one or more of the jurors were prejudiced against defendant and corruptly qualified for the purpose of convicting him.

FROM the judge of the circuit court of Prentiss county.

HON. EUGENE O. SYKES, Judge.

Fugate, the appellant, was indicted, tried, and convicted of murder. His case is twice reported—*Fugate* v. *State,* 82 Miss., 189; *Fugate* v. *State,* ante p. 86. The judge of the court below, after appellant's second conviction, denied his petition for a writ of error *coram nobis,* and he appealed to the supreme court.

After the circuit court had adjourned, defendant presented his petition in vacation to the judge of the court who presided at the trial for a writ of error *coram nobis,* seeking to have the proceeding stayed until the determination of the petition for writ of error *coram nobis.* The petition alleges that three of the jurors had formed and expressed an opinion as to the guilt of petitioner prior to their having been accepted as jurors, and that this was unknown to petitioner or his counsel until after court adjourned; that one juror, Linglebeek, before he had been

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accepted as a juror, said in the presence of witnesses "that, if the facts of the case were as he heard them, and he had heard them mighty straight, Joe Watt Fugate ought to be hung without trial;" that Linglebeek stated on his *voir dire* that he had not formed or expressed an opinion as to the case; that another juror (Perry Majors) said before the trial "that Joe Watt Fugate ought to be hung, and he believed he would hang, and that he (Majors) could cut the rope;" that Majors on another occasion said that Joe Watt Fugate ought to hang, and he believed he would hang; that another juror (Luther Garner) had expressed an opinion as to the guilt of Fugate; that, while petitioner could not give the exact words used by Garner, yet said expressions were extremely unfavorable to petitioner, and conveyed the impression that Garner was convinced of the guilt of petitioner. Affidavits were filed with the petition sustaining the allegations as to what these jurors had stated. The petition avers that neither appellant nor either of his attorneys knew that said jurors had expressed said opinions until after the adjournment of court, and that they had exercised all due diligence to ascertain the character of the jurors, and could not, after due diligence, discover these facts.

Boone & Curlee, for appellant.

The court below in this case evidently denied the writ upon the ground that such a remedy does not apply in a criminal case, as the showing made in the petition, if true, would entitle appellant to a new trial. This kind of proceeding is unusual in our state. In the case of *Holt* v. *State,* 78 Miss., 631, it was resorted to, but the writ was denied in that case by the circuit judge and affirmed by this court, for the reason that the petition itself made no showing whatever that would justify any court in granting a new trial.

The court, in deciding the Holt case upon writ of error *coram nobis,* expressly declined to pass upon the question as to whether or not such a writ can be invoked in criminal cases, and

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also declined to decide whether such a writ, if allowed at all, may be reviewed by the supreme court upon the action of the circuit judge in vacation refusing it, and contented itself with the declaration that the judge's action in refusing the writ was certainly correct, as no court would ever grant a new trial on the showing made by the petition in that case. This case, however, makes what we contend is a full and complete showing, which, if presented upon a motion for a new trial, would necessarily result in the court granting a new trial. Upon passing upon this petition by this court upon the order refusing the same, the facts set forth are admitted, and if we admit that these three jurors expressed the opinions placed in their mouths by the affidavits in this record, then no court would refuse to grant a new trial on such a showing. Three affidavits are presented as to one juror, in which they say said juror used as strong language as to the guilt of the defendant as could possibly be used, stating that he ought to be hanged, and he would be willing to help hang him. Equally as strong statement was made as to the other juror, as sworn to in the affidavits by two parties.

The writ has often been recognized by this court, and our court in the case of *James* v. *Williams*, 44 Miss., 47, uses this language: "There is no reference to a writ of error *coram nobis* in the code, but it is a common-law right. The judgment as in this case may be recalled and the case reversed, either by this writ or by motion." While it has been invoked generally in civil matters, it is applicable to both civil and criminal actions. 5 Ency. Pl. & Pr., 32.

W. M. Cox, and *William Williams,* attorney-general, for appellee.

The writ of error *coram nobis* is obsolete in Mississippi. It has not been allowed in any case since *James* v. *Williams,* 44 Miss., 47.

While an ancient writ of the common law, it seems to have fallen into disuse everywhere. "The writ of error *coram nobis*

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is now superseded by motion, and is falling into disuse." Freeman on Judgments, sec. 93. "The writ of error *coram nobis* has never been used in this state, and is falling into disuse in England. Its place is supplied by motion in the court where and during the time when the error occurred. It is an obsolete writ." *McKindley* v. *Bush,* 43 Ill., 488.

"In general and in the practice of most of the states, this remedy is nearly exploded, or at least superseded by that of amendment on motion." *Pickett* v. *Ledgerwood,* 7 Pet. (U. S.), 144.

If superseded by motion, it would seem that it was never employed except in cases where motion during the term would have been sufficient. The writ of error *coram nobis* has never, so far as can be discovered after diligent search through the entire history of English and American jurisprudence, been employed to impeach the integrity of the trial jury. Appellant's attorneys, with all their well-known learning and diligence, have not been able to present such a case.

Argued orally by *J. M. Boone,* for appellant, and by *W. M. Cox,* and *William Williams,* attorney-general, for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

The petitioner was tried and convicted of murder, and sentenced to be hanged, at the February term, 1904, of the circuit court of Prentiss county. From that conviction he prayed and obtained an appeal to this court, which is this day disposed of. After the adjournment of the court, he, in vacation, on the 21st day of September, 1904, presented to the circuit judge of that judicial district this petition for writ of error *coram nobis,* in which, in brief, he seeks to have the judgment of the said circuit court condemning him to death arrested, and all proceedings stayed, until the determination of his petition for this writ of error *coram nobis.* The grounds upon which he prays for this writ are that three of the jurors (Theodore Linglebeek, Perry

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Opinion of the court.

Majors, and Luther Garner) who tried defendant had formed and expressed, each, an opinion against the petitioner, although each had denied upon his *voir dire* that he had formed or expressed any opinion. (The reporter will set out the particular averments as to what each of these jurors has, as alleged, said.) It is to be specially noted just here that the ninth ground of the motion for a new trial assailed juror Linglebeek for the same reason—to wit, that he had formed and expressed an opinion; and the tenth ground so assails the juror Luther Garner. It is said, however, by counsel for appellant, that the particular facts on which he was proceeding for a motion for a new trial as to these two jurors were different from those on which he was proceeding as to these same jurors in this proceeding; but it is clear, at all events, that the subject of their disqualification because of the formation and expression of opinions was presented to the circuit court in the motion for a new trial, but no evidence was introduced touching the same, and it was abandoned, so that Perry Majors is clearly the only juror of these three of whom no complaint was made on this score in the circuit court trial.

There is some confusion apparent in the books as to the appropriate office of a writ of error *coram vobis* and of the writ of error *coram nobis.* We quote, as the most accurate statement we have seen on this subject, the language of the court in the case of *Teller* v. *Wetherell,* 6 Mich., 49-51: "When the object of the writ is to remove a judgment from an inferior into a superior court for review and the correction of errors of law or fact, it is called a 'writ of error' only—nothing more. But when the object of the writ is to correct an error of fact in the same court that rendered the judgment, it is called a writ of 'error *coram nobis*' if it be in the king's bench, and a 'writ of error *coram vobis*' if it be in the common pleas. A writ of error is an original writ, and in England issues out of the court of chancery, and runs in the name of the king. With us, it issues from this court, and, under our present judicial organization, can issue from no other. It is 'in the nature as well of a *certio-*

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rari to remove a record from an inferior into a superior court as of a commission to the judges of the superior court to examine the record, and to affirm or reverse it according to law.' 2 Saund., 101a. The writs *coram nobis* and *coram vobis* differ from a writ of error in two particulars: (1) They contain no *certiorari* clause, for there is no record to be certified; (2) they have no return-day, as they are in the nature of a commission only to the court to correct error. They lie for errors of fact, and for errors in the process, or through the default of the clerks. 1 Arch. Prac., 234. They do not lie when the error is in the judgment of the court itself, and not in the process. 1 Arch. Prac., 235. The writ is called a 'writ of error *coram nobis*' in the king's bench, because the record and proceedings are stated in the writ to remain 'before us' ('*coram nobis*')—that is, in the court of king's bench. 1 Arch. Prac., 234; 2 Saund., 101a. The king, by a fiction of law, is supposed to preside in person in that court. In the common pleas, where the king is not supposed to preside, it is called a 'writ of error *coram vobis*,' because the record and proceedings are stated in the writ to remain 'before you' ('*coram vobis*')—that is, the king's justices. 2 Tidd. Prac., 1056a, note 'y.' See 'A Writ of Error *Coram Vobis* in the Common Pleas,' in Arc. Forms, 243; 2 Dunlap's Prac., 1125. . . . The judgment for plaintiff for an error of fact on a writ *coram nobis* or *coram vobis* is that the judgment be revoked; on a writ of error, that it be reversed. *Camp* v. *Bennett,* 16 Wend., 48."

It is to be observed, as said in *United States* v. *Plumer,* 3 Cliff., 58 (Fed. Cas., No. 16,056), that, apart from the fact that these formal differences designated the particular court in which the judgment was rendered and to which the writ was returnable, they were never of any particular importance, as the office of the writ of error was the same in both courts.

It is perfectly clear, we think, on the authorities, that the writ is applicable to criminal as well as civil proceedings. Says Elliott, J., in *Sanders* v. *State,* 85 Ind., 324 (44 Am. St. Rep.,

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29): "This was a very common remedy in civil actions, but was seldom resorted to in criminal cases. Although rarely used in criminal cases, we find it conceded by courts and writers to be an appropriate remedy in criminal prosecutions as well as in civil actions." To the same effect, see *U. S.* v. *Plumer,* 3 Cliff., bottom of page 59 (Fed. Cas., No. 16,056); *State* v. *Calhoun,* 50 Kan., 523 (32 Pac., 38; 18 L. R. A., 838; 34 Am. St. Rep., 141); 5 Ency. Pl. & Pr., 32, par. 7. Indeed, it is obvious from the very nature and office of the writ that it applies as well to criminal as civil proceedings, in a proper case. For the "office of the writ is to bring the attention of the court to, and obtain relief from, errors of fact, such as the death of either party pending the suit and before judgment therein; or infancy, where the party was not properly represented by guardian; or coverture, where the common-law disability still exists; or a valid defense existing in the facts of the case, but which, without negligence on the part of the defendant, was not made, either through duress or fraud or excusable mistake." Ency. Pl. & Pr., vol. 5, par. 2. It is true, doubtless, as said by Elliott, J., that the writ "is seldom used in criminal proceedings;" but this results from the necessary differences between the steps usually taken and the mode of procedure in a civil and a criminal trial—in other words, from the inherent differences in the two modes of procedure. Wherever, in any procedure, civil or criminal, a proper case is made for the issuance of the writ, it still exists as at common law, and may still, therefore, be used, unless a statute forbids. Ency. Pl. & Pr., vol. 5, p. 30. Our own court has so said in *James* v. *Williams,* 44 Miss., 47. As well said by Cowan, J., in *Smith* v. *Kingsley,* 19 Wend., 620: "The power, therefore, remains as at common law, except as to the mere form, '*coram nobis resident.*' . . . We, therefore, have lost the name of the writ, but nothing more."

As a striking and conclusive illustration of the necessity that the writ, or some substitute for it, should exist in criminal practice, we refer to *Calhoun* v. *State, supra; Sanders* v. *State,*

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supra, and especially to the case of *Ex parte Gray,* 77 Mo., 160. The statute of Missouri provided that, when any person under eighteen years of age was convicted of a felony, he should be sentenced to imprisonment in the county jail, and not in the penitentiary. Gray, though under eighteen years of age when the felony was committed, had been sentenced to the penitentiary at a term of a circuit court, and after the adjournment of the term he filed his petition for this writ to have the judgment set aside; and, it appearing by satisfactory evidence that the fact was as stated, the judgment was revoked, in order that the defendant might be sentenced according to law. This is but one instance illustrative of the necessity of the writ in criminal practice, and a thousand might be conceived.

But whilst the writ is recognized as existing in this state (see *James* v. *Williams, supra; Fellows* v. *Griffin,* 9 Smed. & M., 362; *Parkinson* v. *Waldron,* 7 Smed. & M., 189), there is rarely any occasion to resort to this writ in modern criminal practice, as shown by the observations in *Martin Pickett's Heirs* v. *Ledgerwood,* 7 Pet., 144 (8 L. ed., 639), where the court say: "It cannot be questioned that the appropriate use of the writ of error *coram nobis* is to enable a court to correct its own errors—those errors which precede the rendition of judgment. In practice, the same end is now generally attained by motion, sustained, if the case require it, by affidavits; and it is observable that so far has the latter mode superseded the former in the British practice that Blackstone does not even notice this writ among his remedies. It seems that it is still in frequent use in some of the states, and, upon points of fact to which the remedy extends, it might be beneficially resorted to as the means of submitting a litigated fact to the decision of a jury—an end which, under the mode of proceeding by motion, might otherwise require a feigned issue, or impose upon a judge the alternative of deciding a controverted point upon affidavit, or opening a judgment, perhaps to the material prejudice of the plaintiff, in order to let in a plea. But in general, and in the practice of most of

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the states, this remedy is nearly exploded, or at least superseded by that of amending on motion. The cases in which it is held to be the appropriate remedy will show that it will work no failure of justice if we decide that it is not one of those remedies over which the supervising power of this court is given by law." Usually, therefore, a simple motion or petition will accomplish the same purpose which the former procedure by way of writ of error *coram nobis* anciently secured.

Thus far as to the writ, its nature and office, and as to its still existing in criminal practice in this state in rare cases. But the difficulty in securing it in this case lies deeper. It is said in Am. & Eng. Ency. of Pl. & Pr., vol. 5, p. 29, that "an error of fact, for the purpose of this procedure, does not exist in newly discovered evidence." In *Sanders* v. *State*, 85 Ind., 329 (44 Am. St. Rep., 29)—by far the most luminous and exhaustive discussion of the subject we have anywhere found—it is said: "It is our opinion that the courts have the power to issue writs in the nature of the writ *coram nobis*, but that the writ cannot be so comprehensive as at common law, for remedies are given by our statute which did not exist at common law—the motion for a new trial and the right of appeal—and these very materially abridge the office and functions of the old writ. These afford an accused ample opportunity to present for review questions of fact arising upon or prior to the trial, as well as questions of law, while at common law the writ of error allowed him to present to the appellate court only questions of law. Under our system, all matters of fact reviewable by appeal or upon motion must be presented by motion for a new trial, and cannot be made the grounds of an application for the writ *coram nobis*. Within this rule must fall the defense of insanity, as well as all other defenses existing at the time of the commission of the crime. Within this rule, too, must fall all cases of accident and surprise, of verdicts against evidence, of newly discovered evidence, and all like matters." We think this a sound declaration of the present office and scope of this writ, from

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Syllabus.

which it necessarily follows that it cannot be invoked in our practice for the purpose of revoking the judgment by showing that jurors had formed or expressed opinions unfavorable to the defendant. Such assailment of the integrity of the trial jury, for reasons clearly apparent, was never within the scope and office of this writ. Without reference, therefore, to the question whether an appeal would lie from the action of the circuit judge denying this writ in vacation, it is enough to say that, if such an appeal does lie, the writ was properly denied. Because of the confusion existing as to the law touching this writ, we have gone somewhat fully into the matter, and attempted to make clear the present use and scope of this writ in the criminal practice of this state.

Affirmed.

EDWARD GAMMONS *v.* STATE OF MISSISSIPPI.

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1. **CRIMINAL LAW.** *Jurors. Code* 1892, § 2355. *Impartiality. Insanity.* Under Code 1892, § 2355, providing that a juror shall not be disqualified because he has an opinion as to the guilt or innocence of the accused, if it shall appear to the satisfaction of the court that he has no bias of feeling or prejudice in the case and no desire to reach any result in it except that to which the evidence may conduct, a conviction will not be reversed:

   (*a*) Because a juror was adjudged competent who testified on his *voir dire* that he had read of the case; had heard rumors, but had never heard any of the witnesses; that he had an opinion from what he had heard which would require evidence to remove; that, though he had such opinion, he could give defendant a fair trial, because the opinion was based on what he had heard and read, and he had heard none of the particulars; that he had no bias or prejudice against defendant and would try him fairly and impartially on the evidence to be introduced; that he had no prejudice against the plea of insanity, and if the evidence caused him to have a doubt he thought he could give defendant its benefit; nor

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(b) Because another juror was adjudged competent who testified on his *voir dire* that he had no bias or prejudice against defendant, and would give him a fair and impartial trial on the evidence; that he had heard nothing from any one who personally knew, but had formed and expressed an opinion from what he had seen in the newspapers; that this opinion would require testimony to remove, but testimony would remove it; that he would go into the jury box "as free as I believe it is possible for a human mind to be;" that he could not say but that he had a prejudice against the defense of insanity, but that he would give defendant the benefit of all reasonable doubt; that it would depend upon the nature of the insanity as to what effect it would have on his decision, but he would give defendant the benefit of it if it arose from disease which he had contracted from cigarette smoking or from heredity; that in his judgment a man was not entitled to the plea of momentary insanity if his condition at the time of the homicide arose from drunkenness or from brooding over his relations with deceased; that he could give defendant the benefit of all reasonable doubt as to his guilt, whether that doubt was raised by the question of insanity or not.

2. SAME. *Challenges. Code* 1892, § 1423.

Under Code 1892, § 1423, providing that the accused shall have presented to him a full panel before being called upon to make his peremptory challenges, a defendant should withhold all peremptory challenges until a full panel is presented, and not interpose such a challenge on the overruling of his challenge for cause while the panel is incomplete. If a defendant challenges a juror peremptorily, being advised by the court that he need not do so while the panel is incomplete, he cannot complain that a full panel was not presented to him before he was called upon to make such challenges.

FROM the circuit court of, second district, Yalobusha county. HON. SAMUEL C. COOK, Judge.

Gammons, appellant, was indicted, tried, and convicted of murder, sentenced to be hanged, and appealed to the supreme court. The opinion states the facts of the case upon which the decision is based.

Isaac T. Blount, for appellant.

While it appears that for a time the courts were inclined to place a very liberal construction on sec. 2355 of the code in favor of the state, it clearly appears in the later decisions that this

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court construes the section favorably to the accused and these later cases declare the recognized law on this subject. *Klyce* v. *State,* 79 Miss., 652; *Shrepprie* v. *State,* 75 Miss., 740; *Fugate* v. *State,* 82 Miss., 189 (s.c., 33 South. Rep., 492); *Jeffries* v. *State,* 74 Miss., 679.

The case at bar falls clearly within the condemnation of these decisions. That a juror qualifies himself where he has an impression or even a fixed opinion counts for nothing; for, as tersely expressed by Justice Price in Fugate's case, "such is the constitution of the human mind, such the frailty and imperfection of human nature, that one could hardly be expected to declare himself controlled by bias or prejudice, when under oath; and perhaps the more honest the man, the more solemnly would he assert his freedom from both." In impaneling the jury in this case, the trial judge evidently acted upon the supposition that notwithstanding a juror might have a "fixed opinion," yet, if he would say that he had no "bias or prejudice in the case, and no desire to reach any result in it, except that to which the evidence may conduct," he was competent. This is manifestly wrong and condemned by the decisions above quoted and in decisions referred to by the court in considering this question.

I would now call the attention of the court to the manner and, as I contend, the errors of the court in impaneling the jury. When the state accepted the jury, and it was tendered to the defendant, upon examination by defendant's counsel it was found that three jurors were disqualified and they were set aside. This left only nine jurors, and when counsel for the defendant asked for a full panel, he was answered by the court, "I tendered you a full panel twice." My contention is that the defendant was entitled to be tendered a full panel before proceeding further, and it was error to refuse it.

J. N. Flowers, assistant attorney-general, for appellee.

There is but one question raised by counsel for appellant in his brief which merits serious consideration by this court, and

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that is as to the juror Gillon. But it will be noted here that counsel for the defendant did not exhaust his rights and resources at the trial. Gillon was the first man he challenged peremptorily. He challenged him irregularly and out of time. He was not required to challenge any proposed juror at the time he exercised this peremptory challenge upon Gillon. The court advised him at the time that the defendant was not required and had not been required to exercise any peremptory challenge before he had been tendered a full panel of competent jurors. There might have been further investigation as to the competency of this man. But counsel for the defendant seemed to have hurriedly jumped at the opportunity to catch the court in what he considered error and thus get the benefit of it in the record before a second thought could be taken and the error, if any, corrected. At the time juror Gillon was challenged peremptorily there were only six other men who had been declared competent jurors after the examination by the defendant. He exercised his challenge when there were but seven men who had been passed upon by the court as competent on the jury. This was his first peremptory challenge. He exercised it at a time when he might have waited for five other jurors to be accepted by the state and examined by him with a view to challenge for cause, or until five other men should run the gauntlet of both examinations.

Argued orally by *Isaac T. Blount,* and *Robert Powell,* for appellant, and by *J. N. Flowers,* assistant attorney-general, for appellee.

TRULY, J., delivered the opinion of the court.

Two assignments of error are mainly relied upon in the effort to procure a reversal of the judgment and the awarding of a new trial herein. The first is based on the action of the court in impaneling the jury which tried the cause, and arises from the following circumstance: The court had examined upon their *voir*

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dire, and pronounced competent, twelve jurors. The panel thus completed was tendered to the state, and was by the state accepted. Thereupon counsel representing the defendant was allowed to begin anew the examination of individual jurors composing the panel, touching their qualifications and competency. He had thus examined three of the jurors, and, successfully demonstrating their incompetency, challenges for cause had been sustained. At this time counsel asked for a full panel. This the court denied, stating that a full panel had been tendered, and that counsel for defendant would not be required to exercise any of his peremptory challenges until a full panel was tendered him. Counsel for defendant continued his examination of the remaining jurors as to their competency. During the progress of this examination, while the juror Gillon was being questioned, a challenge for cause on behalf of the defendant was submitted as to him, which, after further interrogation of the juror by the court, was overruled. Exception to this ruling was reserved by the defendant, and immediately the juror Gillon was by the defendant challenged peremptorily. The court again stated that he "had not and did not require defendant to exercise his peremptory challenge before he had been tendered a full panel of competent jurors." The examination was concluded, the panel refilled, tendered to and accepted by the state, and then the full panel so constituted was tendered the defendant, to be passed on peremptorily. The defendant exercised a peremptory challenge as to one juror, and announced content as to the remaining eleven. This same proceeding of filling the panel, tendering it to the state and then to the defendant, was continued until the defendant had exhausted his twelve peremptory challenges. Finally the jury was again completed by the acceptance on the part of the state of the juror McCormick. To this juror a challenge for cause was submitted by the defendant, and overruled by the court.

The action of the court in refusing to complete the panel when the defendant had successfully challenged three jurors for

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cause, before requiring the counsel for defendant to continue his examination as to competency of the remaining jurors, is assigned as error. Section 1423, Code 1892, provides that "in all cases the accused shall have presented to him a full panel before being called upon to make his peremptory challenges." By judicial interpretation, this statute has been construed to mean that the defendant is not only entitled to have a full panel tendered him, in the first instance, before being required to exercise any of his peremptory challenges, but, after he has challenged all those on the panel first presented whom he may desire, he is entitled to again have a full panel tendered, and this course repeated until the jury is finally secured. We approve and reaffirm the interpretation given this statute in *Gibson* v. *State,* 70 Miss., 554 (12 South., 582), and *Funderburk* v. *State,* 75 Miss., 20 (21 South., 658). The record here presented shows that appellant's right under the rule quoted was in no particular abridged or denied; that the privilege thereby granted was neither restricted nor limited. In no instance was appellant called on to make a single peremptory challenge when a full panel, previously accepted by the state, was not tendered him. It is true that one juror was peremptorily challenged by the defendant when he was not confronted by a full panel, but this was a purely voluntary act on the part of counsel. The challenge was made out of time, when he was not required to exercise his right, and was persisted in after the court had repeated its statement that counsel was not called on to use his peremptory challenges. But the statute is expressly limited to peremptory challenges, and never contemplated that a full panel should be tendered the defendant after each challenge for cause had been sustained. Such a state of case is not covered by the reason of the law, and to so extend the rule would inevitably produce much confusion and result in uselessly protracted examination of jurors. The better practice to be pursued in impaneling juries in capital cases, or other cases exciting great public interest—and this we com-

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mend—is that the presiding judge shall personally conduct the entire examination in ascertaining the competency of each juror as presented, allowing full latitude to counsel in their suggestions of questions to be propounded, and giving free scope to such preliminary investigation, so as to fully search the conscience of the juror, and then pass on all challenges for cause before the juror is by the court pronounced qualified and allowed to take a seat in the jury box. When the panel is complete of jurors so found to be qualified, present to the state for the exercise of peremptory challenges; when a full panel is accepted by the state, present to the defendant, and call on him to make his peremptory challenges; and so repeat, as hereinbefore indicated, until the challenges are exhausted, or both sides announce themselves content with the jury. In actual practice this rule will be found to insure a full and impartial examination of every juror without unnecessary prolixity or repetition, will prevent much confusion, and will materially expedite the impaneling of juries in cases of great notoriety. Appellant was granted the full benefit of every right under the rule which he invokes, and we find no error in the action of the court in impaneling the jury.

The next assignment of error, and the one most strongly pressed in brief and by oral argument, challenges the correctness of the ruling of the court in pronouncing certain jurors competent.

A thorough and painstaking examination of the record, in which we have read with great care the entire examination of every person called for jury service, and whose competency was passed on by the court, demonstrates that the only two instances in which the ruling of the court is subject to any degree of criticism, with any show of reason, was in holding J. J. Gillon and J. L. McCormick to be competent jurors. The record shows that, of the twelve men who were peremptorily challenged by defendant, Gillon was the only one against whom a challenge for cause had been preferred. The record further

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shows that, of the twelve men who actually served as jurors in the trial of the case, McCormick was the only one whom the defendant asked to challenge for cause. The examination of the other eleven who constituted the panel as accepted showed such absolute fairness and impartiality that no challenge for cause was even suggested. If, therefore, the juror McCormick was qualified under the law, appellant would have no cause of complaint on the score that he did not have a fair and impartial jury. But inasmuch as he exhausted his peremptory challenges, he would have ground of complaint if the record sustains his contention that he was, by an erroneous ruling of the court in pronouncing Gillon competent, compelled to exercise one of the peremptory challenges granted him by the law in excluding from the jury box a disqualified and incompetent juror, who ought to have been excused by the court when challenged for cause. The argument resolves itself into this: If McCormick was incompetent, appellant is entitled to a reversal because he did not enjoy the constitutional guaranty of a trial by an impartial jury. If McCormick was competent, but Gillon incompetent, appellant is entitled to a new trial because he was unlawfully denied the privilege of exercising one of the peremptory challenges allowed him by statute. Both of these contentions are sound, and if either be supported by the record, a reversal must follow.

Was the juror McCormick competent? McCormick, on his *voir dire,* testified: That he had no bias, feeling, or prejudice against defendant, and would try him fairly and impartially on the evidence introduced, would return a verdict according to law and evidence, and had no other motive in going on the jury. He had heard of the case, and had seen it in the paper. Had heard the rumor, but had never heard any of the witnesses, and had never heard it talked in town. That he had an opinion from what he had heard, and "reckoned it would" require evidence to remove that opinion, but, although he had such opinion, he could give the defendant

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a fair trial, because his opinion was based on what he had heard and read; but he had heard none of the particulars, knew none of the evidence, and only knew what "was floating through the country." Had no feeling or prejudice against the plea of insanity, and, if the evidence caused him to have a doubt as to the sanity at the time of the commission of the homicide, thought he could give him the benefit of it. We think the statement of the juror brings him clearly within the express terms of § 2355, Code 1892. That section provides that a juror otherwise competent shall not be disqualified by reason of the fact that he has an impression or opinion as to the guilt or innocence of the accused, "if it shall appear to the satisfaction of the court that he has no bias of feeling or prejudice in the case, and no desire to reach any result in it except that to which the evidence may conduct." This juror, by the very full disclosure of the sources of his information—and there is no hint of any concealment or evasion—showed that he had then on his mind no more than a mere impression, which would in no wise influence his deliberation or operate to the prejudice of the defendant. To hold this juror incompetent, in the light of his examination, would be to judicially repeal the code section cited. As juror McCormick was manifestly competent, appellant was tried by a fair and impartial jury, and his constitutional right in this regard was neither denied nor in any manner abridged.

Did the court err in holding Gillon to be a competent juror?

At the threshold of this investigation we are met by the contention of the state that, under the facts of this record, appellant cannot be heard now to question the correctness of that ruling. It is said: Gillon was challenged out of time, when defendant was not called upon, and when, under the orderly and established practice, he had no right to exercise the power of peremptorily challenging; that the hasty challenging of the juror shows that it was a shrewd effort on the part of skillful counsel to irrevocably hold the court to a ruling which was con-

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ceived to be erroneous, and to prevent the possibility of a reconsideration thereof, which, upon reflection, might have been made, had the challenge been deferred until in the due course of the trial it should properly have been submitted. There is much force in the argument, and cases may arise in which, by a challenge by counsel made out of time, an appellant would be denied the privilege of presenting the ruling of the court for review, particularly where the effect of such act was to deprive the court of an opportunity of reconsidering or reversing its ruling. The orderly procedure which should be duly observed requires that, as a defendant cannot be called on to make a peremptory challenge until presented with a full panel, he should, under the direction of the court, withhold all peremptory challenges until that time. Again, cases might well occur when the state would desire to challenge peremptorily a juror who had been unsuccessfully challenged for cause by the defendant. In the instant case, however, there is no intimation of any desire on the part of the court to reconsider its ruling as to Gillon's competency, and we will not allow the premature challenge of a juror made by counsel in his zeal to secure a possible advantage to his client to so operate as to deprive appellant of any benefit to which he may be rightfully entitled by reason of any ruling of the court.

Recurring to the consideration of the competency of Gillon, we detail his *voir dire* examination: He had no bias or prejudice, and would give a fair and impartial trial from the evidence. Had heard nothing from any one who personally knew, but had formed and expressed an opinion from what he had seen in the papers, principally. This opinion it would require testimony to remove, "but testimony would remove it." Would go into the jury box "as free as I believe it is possible for a human mind to be." That, while he could not obliterate his opinion except by going over the evidence, this would remove it, as his opinion was founded, not on testimony, but on hearsay, which he did not know was correct. That he could not

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say but that he had a prejudice against the defense of insanity, but that he would give the defendant the benefit of all reasonable doubt. It would depend on the nature of the insanity as to what effect it would have on his decision, but would give the defendant the benefit of it if it arose from disease which he had contracted, from cigarette smoking, or was hereditary. But that, in his judgment, a man was not entitled to the benefit of a plea of momentary insanity if his condition at the time of the homicide arose from drunkenness or from brooding over his relations with the party deceased. The last question propounded to this juror, and his answer thereto, we quote literally: "Q. The law would require you, if taken as a juror, under your oath, to give this defendant the benefit of all reasonable doubt engendered in your mind from the testimony in the case as to his guilt or innocence, whether it would involve sanity or insanity or not. Now, if you were taken upon this jury, could you take an oath and give this defendant the benefit of all reasonable doubt as to his guilt, whether that doubt was raised by the question of sanity or not? Ans. I would certainly do that. I would the best I could. I have no other motive in this world than to do this." Appellant contends that this examination, the salient portions of which have just been set out, demonstrates the unfitness and disqualification of the juror, and that the court committed palpable error, and to his prejudice, in not sustaining the challenge for cause. Four cases are relied on to support this contention—viz.: *Jeffries* v. *State,* 74 Miss., 677 (21 South., 526); *Klyce* v. *State,* 79 Miss., 652 (31 South., 339); *Shepprie* v. *State,* 79 Miss., 740 (31 South., 416); and *Fugate* v. *State,* 82 Miss., 189 (33 South., 942). We will examine them in order. In the Jeffries case the facts bearing upon the competency of the juror whose fairness was impugned, as gathered from the opinion, were these: The juror "was fully examined on his *voir dire,* and stated under oath that he knew nothing of the facts of the case at bar, had no bias, prejudice, or feeling, and could try it impartially," whereas,

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in truth, as was disclosed by the motion for a new trial, he did have an opinion, and had expressed as the opinion which he then entertained, that Jeffries, the defendant in the case, "was not justifiable in killing Odell." On this state of case the court held that § 2355, Code 1892, could not be invoked, because that section dealt solely with cases where jurors stated that they held opinions or impressions, and submitted the question of their competency to the judgment of the court, and that it did not apply where the existence of the opinion was denied or knowledge of the facts of the case concealed. The court says: "The juror, having an opinion, and a very decided one, evidently, concealed it from the court and prisoner, and gave no opportunity for the court to see whether he was a competent juror. Had he informed the court that he had an opinion that the defendant was not justifiable in killing Odell, and submitted himself to open examination, and informed the court that the prisoner whom he was about to try was not justifiable, no court would have allowed him to sit as a juror to try it. It would have been no trial, so far as that juror was concerned. This case is practically in that attitude, and the prisoner is entitled to whatever benefit grows out of it." In the Klyce case the conclusion of the court is expressly limited to that particular case, and the facts on which it is based clearly appear from this brief extract from the opinion: "It would nullify the constitutional provision, and seriously endanger the fairness of trials, to hold a juror who has an opinion competent merely because he says he could try the case impartially. He may say so and may think so, but it is for the court to say whether he in fact can, viewed in the light of the weakness of human nature. We are constrained to think that a man who has heard the facts from the state witnesses, believes what they told him, and from that has formed and expressed an opinion, which he still retains, is not an impartial juror, in the meaning of the constitution, whatever may be his own idea of his power to try impartially. We hold this, and nothing more, and think it will

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not require much psychological investigation to sustain this conclusion." In the Shepprie case the entire finding of the court is summed up in a clear and concise statement. We quote: "It is clear to our minds that the appellant did not have a trial by an impartial jury, which is guaranteed to all by the constitution. One may have talked about the case to a witness, and still be a competent juror; but we cannot hold one competent, even under our statute [Code 1892, §2355], who has heard all the facts from an eyewitness, whom he believes truthful, whose statement he credits, and on whose statement he forms a fixed opinion. This was Johnson's frame of mind when he went on the jury, even by his own testimony, and he was not competent, though he says that his opinion 'was not so fixed that it could not be removed by evidence.' It seems certain that, if he had not concealed these facts on his *voir dire,* he would not have been permitted to sit as a juror." In the Fugate case, in the course of an especially able and luminous discussion, Price, J., states the finding of the court in a few strong sentences: "But the oath made, it is at last, by the statute, referred to the judgment of the circuit judge whether the juror is in truth and fact impartial, as to which the circuit judge will determine from all the evidence addressed to that point. He may, from all the evidence, hold him impartial, though he has an impression or opinion. These opinions or impressions, producing no fixed conclusion, leaving the proposed juror without bias of feeling or prejudice, and with the desire tc reach only the result to which the evidence should conduct, are not enough to disqualify. But a settled opinion, arising from rumor, from discussing the facts of the case with others, from hearing the witnesses' account of the testimony, and not knowing whether such proposed juror could ignore his opinion, being on one side of the case, with convictions that would require strong and positive evidence to remove, does disqualify a proposed juror."

An examination of the former opinions of the court on this

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subject simply serves to demonstrate the futility of all effort to frame any definite rule to be followed in passing upon the competency of jurors. The only general proposition really deducible from these opinions is that the decision in every instance must depend on the varying circumstances of the particular case. In determining the question of the competency of each individual proposed as a juror, the court is not bound by the oath of impartiality made by the juror—for no juror can constitute himself the judge of his own competency—but should take into consideration the demeanor of the proposed juror; his answers, as indicating candor or a desire to evade the question or conceal the truth; the impression or opinion which has been formed or expressed; the extent of knowledge of the facts of the case; the sources from which the information came; and from these, and from the many intangible yet potent elements which constitute personality, decide upon the existence of bias or animus either for or against the accused.

The examination of the proposed juror, Gillon, shows that he was a man of intelligence and information. His answers were full, and give no hint of lack of frankness or concealment of the truth. He evinced no desire to be accepted as a juror, but expressed himself freely on every question propounded. He had talked to no witness, nor to any one personally cognizant of the real facts, but, from newspaper reports and from what he had heard in casual conversation, he had an opinion, which testimony would remove; and he announced his ability to go into the jury box with a mind free of bias or prejudice. Ought the court to have excluded him, as being unable or unwilling to try the case impartially? In the case of *Green* v. *State,* 72 Miss., 522 (17 South., 381), where this court, through Cooper, C. J., upholds the constitutionality of sec. 2355, *supra,* and makes a very full analysis of many cases bearing on the subject, the court says: "The juror Mosely on his *voir dire* stated that he lived in the immediate neighborhood where the crime was committed, and had heard it dis-

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cussed, and had formed an opinion as to the guilt or innocence of the defendant, which opinion was of such a fixed character it would require evidence to remove it, but he thought he could try the case fairly and impartially according to the evidence." And upon the exact state of case here presented, the court, as to that juror, says: "The juror Mosely was not disqualified by the character of the opinion he had formed of the guilt or innocence of the defendant, and the appellant has no just cause of complaint because he was forced to exercise his right of peremptory challenge to exclude the juror from the panel." That case was much stronger for the appellant there than is the case at bar. The evident sincerity and frankness of Gillon manifested his willingness and his desire to "a true deliverance make between the state and the prisoner at the bar," and convinced the trial judge, as it has convinced this court, that he was both able and willing to try the case fairly and impartially. We think he was not disqualified by reason of a previously formed opinion. Such prejudgment and opinion as rested on the mind of this juror must perforce be entertained by every intelligent man as to every homicide or other incident of great notoriety, the purported details of which he has learned through the public press. Everything heard must make some impression on an active mind, slight and temporary, or deep and lasting, as the case may be; and the fairest and most truthful of men, if questioned, could only say: "From what I have heard, I have an opinion, which will remain until removed by testimony, but which testimony will remove; but my mind and heart are untainted by bias of feeling or prejudice." But this is not the "fixed opinion" referred to in some opinions as being sufficient to disqualify for jury service. The opinion which is there meant is of such a firm and fixed nature that it engenders in the mind that "pride of opinion" which causes one, involuntarily and innocently, it may be, to combat and doubt testimony tending to cast discredit upon the opinion already fixed. In truth, in a country like ours, where the great mass of the peo-

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ple from whom juries are drawn are intelligent, advised of current events, and keenly alive to all that affects the public weal, to hold that men like Gillon are disqualified to serve as jurors might have the effect of placing the decision of important cases —crimes which stir the public heart—largely in the hands of those who have not the interest of the country at heart, or, more dangerous still, in the hands of the vicious, who, actuated by ulterior motives, would conceal the truth in order to qualify and be accepted as jurors. "Were it possible to obtain a jury without any prepossessions whatever respecting the guilt or innocence of the accused, it would be extremely desirable to obtain such a jury; but this is perhaps impossible, and therefore will not be required." These are the words of Judge Marshall, that great jurist, and were uttered during the trial of Aaron Burr. If, then, the practical impossibility of procuring such a jury was admitted by such an authority nearly a century ago, how much more hopeless is the task in these latter days of rapid and universal dissemination of news through the manifold agencies in use—the telegraph, telephone, daily mails, and enterprising press, with its omnipresent reporter and widespread circulation! In recognition of this condition of affairs, and realizing that in cases of great public concern it might be impossible to find men in the county where the crime was committed who had not formed some opinion, the legislature modified the ancient rule, and enacted sec. 2355, *supra,* so that one otherwise competent is not disqualified by the fact alone that he has an opinion as to the guilt or innocence of the defendant; vesting the court with power to accept the juror if convinced of his fairness, or exclude him if it be doubtful. And this was wise. Of necessity, the power must be intrusted to some one, and to no one more properly than to the circuit judge, who sits as an arbiter in judgment between the state and the citizen and whose duty it is to "hold the scales with a firm hand, without bias or prejudice." Himself untouched by the fervor of partisanship, unswayed by the zeal of advo-

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cacy, he has the proposed jurors before him, sees them, hears them, weighs their words, notes their demeanor, and is better able to advisedly pass upon their competency than any other person or tribunal. So long as the power intrusted to him is fairly exercised, his findings will not be disturbed. This court will intervene only in cases of palpable error, where injustice has been done or there is an evident abuse of discretion.

But it is said Gillon was disqualified by reason of his statement that he was prejudiced against the defense of insanity. Under the facts of this record, we think not. It must not be assumed that the question whether a proposed juror in a criminal case is prejudiced against or favorably inclined toward any particular defense is any test of his qualification for jury duty. The plea in a criminal case is "Not guilty," and it is upon this plea alone that the case is submitted to the jury. Whether the defendant submits as his defense an *alibi,* insanity, self-defense, or any other, the question which the jury is called upon to decide is whether the defendant has been proven guilty by the evidence beyond all reasonable doubt. The true test of competency in this case was that applied by the last question asked Gillon: "Could you give the defendant the benefit of all reasonable doubt as to his guilt, whether that doubt was raised by the question of sanity or not?" And to that query a positive and affirmative answer was made. This fulfilled the requirement of the test. But even giving the rule the narrow construction contended for, it cannot avail the appellant. Appellant's defense (if that can be called a defense which, supported only by fragmentary and inconclusive testimony, draws its main strength from the force and ability with which it is presented by eminent counsel) was hereditary insanity or insanity superinduced by excessive cigarette smoking. As to insanity arising from either of these two specific sources, or if caused by disease, the juror expressly stated that he was not prejudiced as a defense, but would give the defendant the benefit of every doubt as to his sanity. This was the utmost

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that appellant had the right to ask, and even this was an extension of the rule that the juror should not be prejudiced against the defense of insanity of the specific character with which he claimed he was afflicted. Without deciding upon the correctness of the private views which the juror entertained as to the rights other defendants might have to plead as a defense insanity produced by drunkenness or brooding over disappointment in love, they were clearly not material in this case, for the reason that appellant expressly disavowed the existence of either cause.

None of the assignments of error are well taken. Appellant had a fair trial, and, in view of the enormity of the crime, no other verdict could reasonably have been expected.

Affirmed.

HOUSTON G. WOOD v. CHICKASAW COUNTY.

STENOGRAPHERS, OFFICIAL. *Salary. Opening court. Pretermission of term. Code* 1892, § 4242.

An official stenographer, attending the opening of a term of the circuit court, and ready to perform his official duties, is entitled, under Code 1892, § 4242, regulating the subject, to one week's salary where the term was thereafter pretermitted, although the trial of no case was begun.

FROM the circuit court of, first district, Chickasaw county.

HON. EUGENE O. SYKES, Judge.

Wood, the appellant, was plaintiff and petitioner in the court below; Chickasaw county was defendant there. From a judgment disallowing plaintiff's petition and claim he appealed to the supreme court.

Appellant was the official stenographer of the first judicial district of Mississippi. There are two circuit and chancery court districts in Chickasaw county. Appellant attended the

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April term held at Houston. The court was organized, the jurors and witnesses were present, and the officers in attendance. On the first day, and before the trial of any cause was begun, the term of the court was, on petition of some of the citizens, pretermitted. Two weeks later the term of court for the other district was convened, and in the same way, and before the trial of any cause was begun, that term was also pretermitted. At the October term, 1903, appellant, by petition, presented his bill for allowance for two weeks' service. The district attorney, the representative of the county, admitted the facts as stated in the petition, and agreed that the court might consider the allowance for both districts at that time. The court disallowed the claim *in toto.*

Gilleylin & Leftwich, for appellant.

Can a circuit judge adjourn a term of the circuit court with a sworn officer in attendance and refuse to allow him his stipend fixed by statute? This adjournment, wrongfully called "pretermitting" in the petition, was not by written order of the judge provided by sec. 913 of the code. It comes under code sec. 914, and that language of the section "or shall not continue to sit the whole term." The court was assembled and organized, and by petition of the people adjourned without disposing of its business.

The stenographer is a sworn officer charged with important duties. Bond may be required of him (sec. 4239). By sec. 4240 the stenographer is required to attend each session of the circuit court "from day to day." By sec. 4243 it is made a misdemeanor for the stenographer to willfully neglect to perform any duty required of him—*e. g.,* failing to attend each session of court. His salary is fixed by sec. 4242, which is as follows: "The stenographer shall receive for his services a salary of forty dollars for each week or part of a week in which the court shall be held, payable out of the treasury of each county in which the court is held and the services are respective-

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ly performed, which shall be audited and allowed by the court at each session thereof; or in case of failure to do so, then at any subsequent session; and the board of supervisors shall order the issuance of a warrant for the same on presentation of a duly certified order of the circuit court allowing the claim."

The plain terms of this section are that he shall have forty dollars for each week or part of a week in which the court shall be held. Now at each of these terms of court he left his home in Aberdeen before the court met to attend its session. He was at his desk ready to perform the task required of him. All the essentials of a court were in evidence; and the court held at least one day, for the law knows no part of a day. That day was part of a week. Whether the stenographer was able to reach his home before Tuesday or not does not appear, but he certainly performed the service required of him at each court for part of a week. The citizens and taxpayers who bear the burdens saw proper to conserve their own interests, and in some way (crop exigencies, perhaps) persuaded the court to adjourn it. Legal aspects aside, they ought to pay the stenographer his legal stipend as the other officers were paid. It is not a question of what was earned that week, but the question is, What does the law provide for? Shall the officer be held at his post under many penalties, and then be denied compensation?

William Williams, attorney-general, for appellee.

CALHOON, J., delivered the opinion of the court.

The attorney-general, for the county, submits this case without argument.

We think appellant's claim for salary should have been allowed. The courts were duly opened and organized at the proper time and place in the separate court districts of Chickasaw county. Appellant was at his post; but the court, after

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organization, on petition of citizens, adjourned the term. The attending jurors drew their mileage and *per diem.* Mr. Wood was entitled to his pay. Code 1892, § 4242, gives him a salary for "each week or part of a week in which the court shall be held." A part of a day is a part of a week, and the stenographer, traveling from place to place to attend the courts, is as much entitled to his weekly salary, where he is on hand ready for work, and a court is organized, as the jurors, sheriff, or clerk are to their allowance.

Reversed and remanded.

JAMES GOULD v. CHICKASAW COUNTY.

REWARDS. *Fleeing murderer. Code* 1892, § 1387. *Construction. Sheriff of another state. Legal duty.*

An Arkansas sheriff, arresting in that state a person who killed another in this state and who was fleeing before arrest, where he merely notified, by telegraph, the sheriff of the county in which the homicide was committed of the arrest, is not entitled to the reward provided for under Code 1892, § 1387, authorizing the payment of one hundred dollars out of the county treasury for the arrest and delivery up for trial of a fleeing homicide, because:

(*a*) He did not deliver up the prisoner for trial within the meaning of the statute; and

(*b*) He was under legal duty to have made the arrest.

FROM the circuit court of, second district, Chickasaw county.

HON. EUGENE O. SYKES, Judge.

Gould, the appellant, was plaintiff, and Chickasaw county, the appellee, defendant in the court below. From a judgment in defendant's favor the plaintiff appealed to the supreme court.

In 1903 a man named Thomas Fennerson shot and killed one Thomas Page in Chickasaw county, Mississippi, and fled to

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Jefferson county, Arkansas, where he was arrested by appellant, James Gould, who was then sheriff of Jefferson county, Arkansas. Gould telegraphed the sheriff of Chickasaw county, Mississippi, who sent for Fennerson and brought him back to this state, and he was tried and convicted. Gould then presented his claim to the circuit court of Chickasaw county for the satutory reward of $100, which was refused by the court.

A. T. Stovall, for appellant.

The agreed statement of facts shows clearly that Thomas Fennerson was fleeing from his crime, and that it had only been three days from the date of the killing until he was arrested in Arkansas; so there can be no doubt of the fact that the defendant actually attempted to escape arrest, and in this respect his conduct is different from Kirkpatrick's conduct in the case of *Monroe County* v. *Bell,* 18 South. Rep., 121. The defendant there, Kirkpatrick, "remained at his home for two days after the shooting, not concealing himself, and then left for Texas, and it was generally known where he was;" so he was not fleeing from justice. Whereas, in this instance, Fennerson immediately left the scene of the difficulty for parts unknown; so he was fleeing from justice. If he was, whoever arrested him, except an officer under obligation to make the arrest under the law and by virtue of his office, would be entitled to the statutory reward. Code 1892, § 1387.

It is true in this case that Gould was the sheriff of Jefferson county, Arkansas, but it is not true, as in the Bell case, that it was Gould's duty "to arrest, or to give aid to the arrest and detention of, a fugitive from justice from another state," etc., as it was the duty of Bell, sheriff of Hill county, Texas, by virtue of Texas Code, Criminal Procedure, 1879, art. 1023. There being no statute in Arkansas like the Texas statute, and this appellant not having a warrant or requisition authorizing him to arrest a fleeing homicide, he was under no legal obligation to do so, and so he was entitled to the statutory reward.

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It would be a bad policy indeed for this state to establish a precedent of not rewarding non-resident officials, who are under no legal obligation to seek out and possibly risk their lives in arresting fleeing homicides from Mississippi.

J. N. Flowers, assistant attorney-general, for appellee.

There was no delivery of the homicide for trial as contemplated. The appellant detained the criminal, notified the sheriff of Chickasaw county that he had him, and the Mississippi officer went after and received him from appellant. He did not "deliver him up for trial." He saved himself that trouble and expense. The reward is not for the arrest alone, but also for the delivery.

It was the duty of the Arkansas sheriff to apprehend this criminal, and the decision of this court in *Monroe County* v. *Bell,* 18 South. Rep., 121, is conclusive.

The sheriff's has always been an office of dignity and responsibility. He is the principal peace officer in every county and state. Murfree on Sheriffs, sec. 1160. Whenever a sheriff knows of a criminal in his county, it is his duty to take steps to have him arrested. It is his duty to aid in the enforcement of the laws, and this duty, in view of the good will and mutual dependence among the states, extends to cases in which other states are interested. 12 Am. & Eng. Ency. Law (2d ed.), 607. The sheriff in the case at bar acted under the general law, or the arrest was illegal, and he cannot recover if the arrest was illegal. 24 Am. & Eng. Ency. Law (2d ed.), 948.

Section 3488 of the digest of statutes of Arkansas (1894) is as follows: "Whenever any person within this state shall be charged, on oath or affirmation of any creditable person, before any judge or justice of the peace of this state, with the commission of any crime in any other state or territory of the United States, and that such person hath fled from justice, such judge or justice shall issue his warrant for the apprehension of such person."

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And a sheriff in Arkansas is a conservator of the peace, and among other duties specified "he shall apprehend and commit to jail all felons and other offenders." Sec. 7162, Dig. Ark. 1894.

TRULY, J., delivered the opinion of the court.

Appellant was not entitled to recover the statutory reward for arresting a fleeing homicide. He did not comply with the terms of § 1387, Code 1892, granting such rewards, for the reason that he did not "deliver him up for trial." Again, the appellant was a sheriff, an officer charged by law with the duty of making arrests, and, as such, not entitled to any reward for performing an act which was simply in the discharge of his official duty. Sand. & H. Dig. St. Ark., sec. 7162; *Railway Co.* v. *Grafton*, 51 Ark., 508 (11 S. W., 702; 14 Am. St. Rep., 66); *Monroe County* v. *Bell* (Miss.), 18 South., 121.

Affirmed.

ALONZO L. REED v. AMELIA REED.

MARRIAGE AND DIVORCE. *Alimony pendente lite. Invalidity of marriage.*

A complainant in a suit for divorce who is the undivorced wife of another is not entitled to recover of the defendant alimony *pendente lite*, and the defendant may show in defense of an application for the same the truth of his answer under oath denying the validity of his marriage to complainant because of her relation as wife to another person.

FROM the chancery court of Tunica county.

HON. CAREY C. MOODY, Chancellor.

The appellee, Amelia Reed, was complainant, and the appellant, Alonzo L. Reed, was defendant in the court below.

Bill by Amelia Reed against Alonzo L. Reed for divorce and alimony. Defendant answered the bill under oath, denying the

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marriage and alleging that plaintiff at the time of her marriage to defendant was married to another and had obtained no divorce. The answer also denied the grounds for divorce alleged in the bill. On an application for alimony *pendente lite,* defendant requested that the hearing be continued until he could take testimony, which was denied, whereupon defendant offered evidence to show complainant's marriage to one Brooks before her pretended marriage to defendant, which evidence was excluded; and from a decree allowing alimony *pendente lite,* defendant appealed to the supreme court.

J. T. Lowe, for the appellant.

Marriage is the very foundation of the obligation of the husband to support the wife, and where the fact of marriage is denied by the husband's answer, preliminary proof of the same must be made. *McFarland* v. *McFarland,* 64 Miss., 449, and authorities therein cited. Temporary alimony cannot be properly allowed where the validity of the marriage is called in question and remains undetermined. *Keiffer* v. *Keiffer,* 4 Colo. App., 506 (s.c., 36 Pac. Rep., 621); *Wait* v. *Wait,* 7 Leg. Gaz., 382; *York* v. *York,* 34 Iowa, 530; *Shaw* v. *Shaw,* 92 *Ib.,* 722; *Freeman* v. *Freeman,* 49 N. J. (4 Dick.), 102; *Brinkley* v. *Brinkley,* 50 N. Y., 184; *Humphreys* v. *Humphreys,* 49 How. Pr., 140; *Kinsey* v. *Kinsey,* 7 Daly, 460; *McFarlane* v. *McFarlane,* 51 Iowa, 565.

An application for alimony *pendente lite* should not be granted where there is uncontroverted evidence that the applicant has never been the wife of the defendant. *Collins* v. *Collins,* 71 N. Y., 269; *vide* also *Blinks* v. *Blinks,* 25 N. Y. Sup., 768.

[The reporter finds no brief for appellee in the record.]

WHITFIELD, C. J., delivered the opinion of the court.

The learned chancellor seems to have held that under no circumstances could evidence be heard against allowing alimony

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pendente lite. The general rule is, of course, that such alimony will be allowed, and the merits not inquired into. But it is equally well settled that where the answer denies there ever was a marriage, and that averment, clearly, from the showing made, appears to be true, no alimony *pendente lite* should be allowed; and this for the reason, as stated in *McFarland* v. *McFarland,* 64 Miss., 449 (1 South., 508), that marriage is the very foundation of the wife's right to support. It would be monstrous that the law should require the payment of alimony *pendente lite* to one who clearly never was a wife. Some *prima facie* showing of marriage must be made when it is allowed. So are all the authorities. See Am. & Eng. Ency. Law, vol. 7, p. 101, with notes.

Reversed and remanded.

REUBEN N. DAY v. BEATRICE F. OATIS ET AL.

1. **FEDERAL COURTS.** *Removal of causes. Actions removable. Cancelling clouds on title.*

   A suit to remove clouds from title to land is not within the exclusive jurisdiction of the state court, and may be removed, the citizenship of the parties justifying it, into the federal court.

2. **SAME.** *Petition for removal. Demurrer.*

   Where the complainant demurred to the defendant's petition to remove the cause to the federal court, he thereby admitted the truth of the petition, and cannot upon appeal justify a judgment denying the removal by reference to the evidence.

3. **SAME.** *Diverse citizenship.*

   The diverse citizenship which must exist both at the time an action is begun in the state court and at the time a petition for removal is filed, in order to entitle the petitioner to have the cause removed, is a diversity of citizenship existent in fact, and not one merely shown to exist from the pleadings.

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4. SAME. *Disclaimer of interest by resident.*

Where a suit to remove a cloud from complainant's title is brought against a resident and a non-resident, and the resident disclaims interest, thereby retiring from the suit, the non-resident may procure the removal of the cause to the federal court.

FROM the chancery court of Scott county.

HON. JAMES L. MCCASKILLS, Chancellor.

Mrs. Oatis and others, all citizens of Mississippi, appellees, were complainants in the court below. The suit was one to remove clouds from title to land. Day, appellant, a citizen of the state of Minnesota, and a corporation of Mississippi, the Kreutzer-Winton Company, which disclaimed any interest in the land sued for, were defendants. From an order refusing to transfer the cause to the federal court, on petition of defendant Day, he appealed to the supreme court. The facts are fully stated in the opinion of the court.

Green & Green, for appellant.

It was error to refuse to grant the petition of R. N. Day to remove the cause to the federal court and to sustain the demurrer of complainants thereto, after the Kreutzer-Winton Company had disclaimed.

It is manifest that the right of removal existed on two several and independent grounds: First, because there was but a single defendant, and he was a non-resident and entitled to remove if the suit had been against him alone, and it became such when the disclaimer was filed; and second, because independently of this the cause was a separable controversy as to Day, complete relief could be granted to the complainants as against him without the presence of any other defendants and entirely independent of any of their rights.

As said in 1 Desty's Fed. Proc. (9th ed.), 473: "If a bill to quiet title is filed against several persons as tenants in common, one of them may remove it." *Field* v. *Lowndsdale,* Deady, 288.

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The contention that the federal court would be without jurisdiction surely cannot be meant seriously, as this is a plain equity suit for the cancellation of clouds upon title, and the federal courts are just as competent to act in the premises as the state courts, and can grant exactly the same relief as would be given in the local tribunals. It is the boast of the federal courts that a citizen never loses a single right by invoking their jurisdiction and that they will always administer the same measure of right as the local courts.

Under the universal rule where a new equitable remedy is given by state statutes or an equitable right previously existing is so enlarged, the federal court will assume to enforce the same to the same extent and in the same manner as the state courts, subject only to the limitation that the rights granted by the seventh amendment are not infringed, whereby a jury trial is granted to defendants under certain circumstances. In the case at bar the lands are timber lands, and there is no averment in the pleadings, in the bill, whereby it is shown that this defendant is now, or ever has been, in possession; and presuming all things against the pleader, we are at liberty to assume, and do so for the purpose of argument, that said lands are new, wild and uncultivated, and are in actual possession of no one, so that an action of ejectment could not be maintained.

On this proposition *Pine Land Co.* v. *Hall,* 105 Fed. C. C. A., 5th (1900), 88, before Pardee, McCormick, and Shelby, circuit judges, this precise section of our code and the remedy thereby enlarged came under review in our federal circuit court of appeals, and there Justice Shelby said: "The first question raised is as to the jurisdiction of the circuit court. The original bill was filed in the chancery court of Pearl River county, Mississippi. The plaintiff was a Mississippi corporation, and the defendant a citizen of Michigan. The value of the land exceeded $2,000. On petition of the defendant the case was duly removed from the state court to the circuit court of the United States for the southern district of Mississippi. The

plaintiff moved to remand the case to the state court because the circuit court has no jurisdiction in the premises, there being no ground of equity jurisdiction stated upon the face of the bill of complaint, save under a statute of the state of Mississippi, which cannot enlarge the equity powers of the circuit courts.

"The seventh amendment to the constitution of the United States declares that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

"This amendment is a limitation on the equity jurisdiction of federal courts. If the legislature of the state, providing for the trial of common-law cases in equity, was binding on federal equity courts, this amendment of the constitution could be made useless. Such state statutes do not control the federal courts. A state statute, therefore, which confers jurisdiction of common-law cases on state equity courts, thus dispensing with trial by jury, will not be admitted in federal courts of equity." *Scott* v. *Neely,* 140 U. S., 106 *Cates* v. *Allen,* 149 U. S., 451.

It is well settled, however, that an enlargement of equitable rights may be administered as well by the United States courts as by the state courts. *Clark* v. *Smith,* 13 Pet., 195; *Broderick's Will,* 21 Wall., 503, 520; *Greely* v. *Lowe,* 155 U. S., 5875; *Smyth* v. *Ames,* 169 U. S., 466.

The result of the decision of the supreme court is that a state statute which enlarges equitable rights will be enforced and administered in the United States courts in all cases where its enforcement and administration do not conflict with the rights of the parties to a jury trial. *Hipp* v. *Babin,* 19 How., 271; *Thompson* v. *Railway Co.,* 6 Wall., 134; *Insurance Co.* v. *Bailey,* 13 Wall., 616; *Grand Chute* v. *Winegar,* 15 Wall., 373; *Buzzard* v. *Huston,* 119 U. S., 347; *Harding* v. *Guice,* 80 Fed., 162; *Green* v. *Turney,* 98 Fed., 756.

To review and quote from these cases would serve no useful

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purpose. That work has already been done by Judge Taft, speaking for the United States circuit court of appeals for the sixth circuit in *Grether* v. *Wright,* 75 Fed., 742. We will, however, quote the following from an opinion of the supreme court delivered by Justice Brown: "This court has held in a multitude of cases that where the law of a particular state gave a remedy in equity, as, for instance, a bill by a party in or out of possession to quiet title to lands, such remedy would be enforced in the federal courts, if it did not infringe upon the constitutional rights of the parties to a trial by jury." *Greely* v. *Lowe,* 155 U. S., 75; *Brinkerhoff* v. *Broomfield,* 94 Fed., 426; *Bank* v. *Hubbard,* 105 Fed. C. J. R., 1900, 814; *Grether* v. *Wright,* 75 Fed. C. C. A., 6th, 1897, 746.

As said by Mr. Justice Swayne in *Ex parte McNeil,* 13 Wall., 243: "This principle may be laid down as axiomatic in our national jurisprudence. A party forfeits nothing by going into a federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same consideration, as if it had been brought in the proper state tribunal of the same locality. *Robinson* v. *Campbell,* 3 Wheat., 223; *United States* v. *Knight,* 14 Pet., 315; *Steamboat Orleans* v. *Phoebus,* 11 In., 184; *Thompson* v. *Phillips,* 1 Baldwin, 272; *Lorman* v. *Clark,* 2 McLean, 568; *Ex parte Biddle,* 2 Mason, 472; *Johnson* v. *Vandyke,* 6 McLean, 423; *Prescott* v. *Hevers,* 4 Mason (s.c., Rose's Notes on U. S. Rep., 674).

As said in *Davis* v. *Gray,* 16 Wall., 221: "A party by going into a national court does not lose any right of appropriate remedy of which he might have availed himself in the state courts of the same locality. The wise policy of the constitution gives him a choice of tribunal. In the former he may hope to escape the local influences which sometimes disturb the even flow of justice. And in the regular course of procedure, if the amount involved be large enough, he may have

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access to this tribunal as the final arbiter of his rights." s.c., 7 Rose's Notes on U. S. Rep., 689.

And as said by Mr. Justice Bradley, in Broderick's Will, 21 Wall., 520: "Whilst it is true that alterations in the equitable jurisdiction of the circuit courts of the United States as long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the circuit courts as well as by the courts of the state."

Wherefore it is perfectly manifest that the federal court would have jurisdiction and that the state court's jurisdiction was not exclusive, and as there was but one defendant and there being no amendment making the owners of the other one-half interest parties to the suit, we cannot understand why the petition to remove to the federal court should not have been granted both on the ground of a single non-resident defendant and on further ground that this controversy was severable, and respectfully submit, therefore, that the chancery court erred in taking jurisdiction and that the decree should be reversed and the cause remanded, with instructions to remand the same to the circuit court of the United States for the southern district of Mississippi, or if the chancery court rightly maintains jurisdiction, then the decree should be reversed and the bill dismissed.

Amis & Dunn, for appellees.

Should the cause have been removed to the federal court on the application of R. N. Day? We answer no. In our opinion the action of the court in dismissing the petition for removal was correct. If the cause was not properly a removable one, then it follows that to remove it would have been error and would not have given the federal court any jurisdiction of the cause. The federal circuit courts are courts of limited jurisdiction, and unless a cause falls within the limitations prescribed by the federal statute touching removal of causes, then the federal court has no jurisdiction, and an erroneous removal

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of the cause would not confer jurisdiction. Hence the acts of the federal court would be *coram non judice*. *Scott* v. *Neely*, 140 U. S., 106; *Thayer* v. *Life Ass'n*, 112 U. S., 719; *Burnham* v. *Bank*, 53 Fed., 167. Our contention, therefore, is that this is not a removable cause, and for that reason the federal court is without jurisdiction and the chancery court of Scott county is the only court having jurisdiction of the cause.

In order to authorize the removal of a cause on the ground of diverse citizenship, it has been uniformly held under every act of congress that every necessary party upon one side of the controversy must be a citizen of a different state from every necessary party upon the other. *Gage* v. *Corraher*, 154 U. S., 656; *Wilson* v. *Otsego*, 157 U. S., 56.

And this diversity of citizenship must exist at the time of the commencement of the suit as well as at the time of filing the petition for removal. *Mattingly* v. *Railroad Co.*, 158 U. S., 53; *Kellman* v. *Keith*, 144 U. S., 568.

At the time of the commencement of this suit all the complainants were citizens of Mississippi, and one of the defendants—to wit, the Kreutzer-Winton Company—was a Mississippi corporation domiciled in Scott county. So, clearly, the cause as it then stood was not a removable one. But subsequent to the filing of the suit the Kreutzer-Winton Company appeared and filed a disclaimer of interest in the land, alleging that before service of process on it, it had sold its interest to A. L. Kreutzer and W. C. Winton. Then it is that Mr. Day comes in and says: "I am the only defendant here, and I ask that the cause be removed to the federal court." Up to this point that is the case made by the record. Let us see how it measures up to the requirements of the law. The question of removal because of diverse citizenship being one of jurisdiction, the court in passing upon it looks solely to the nature of the case made by the plaintiff's declaration or bill. And a judgment by default or an entry of disclaimer will not affect the removability of the cause. *Brown* v. *Trousdale*, 138 U. S., 389; *Hay* v. *Casper*,

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31 Fed. Rep., 509; *Railroad Co.* v. *Sole,* 114 U. S., 57; *Putnam* v. *Ingraham,* 114 U. S., 57; *Rumsey* v. *Call,* 28 Fed. Rep., 770; *Washington* v. *Columbus R. Co.,* 53 Fed. Rep., 673. Even where the plaintiff paid to some of the defendants the amount due them, it was held that the cause was not thereby rendered a removable one as to the sole remaining defendant. *Rosenthall* v. *Coats,* 148 U. S., 147.

But counsel say that there is a separable controversy between complainants and defendant R. N. Day, and for this reason the cause ought to be removed. In determining this question we must look solely to the case made by the bill of complaint, and all its allegations must be taken as true. *Wilson* v. *Atsegp Tp.,* 151 U. S., 65; *Winchester* v. *Loud,* 108 U. S., 131; *Life Ass'n* v. *Farmer,* 77 Fed. Rep., 932.

Keeping this in mind, let us see what is the nature of the case made by the bill. The bill is one for the cancellation of clouds on title. It avers that complainants are the sole, true, and legal owners of the land and deraign their title thereto. It then avers that the defendants R. N. Day and the Kreutzer, Winton Company claim some sort of an interest in said lands, the said Kreutzer-Winton Company claiming a half interest under a deed from W. C. Winton, and the said R. N. Day claiming under divers deeds from Bessie, Ellen, R. C., John D., and Jeff Kent, to W. C. Winton and R. N. Day. The bill then charges that said divers pretended deeds cast a cloud on complainants' title and prays that all said deeds be canceled. It will be observed by an inspection of the bill that W. C. Winton and R. N. Day purchased these lands from the Kents, who executed deeds to them jointly, and that subsequently Winton conveyed his half interest to the Kreutzer-Winton Company. It will be further noted that so far as the bill shows there is no common source of title as between complainants and defendants. Upon this state of facts, and so far as the bill shows, the only muniments of title that Day has to the land are the deeds from the Kents, while the sole muniments of title that

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Kreutzer-Winton Company have are the Kent deeds and the Winton deed. Now the bill prays for a cancellation of these muniments of title. That is the relief sought by the bill. Under such a state of facts is there a separate cause of action in complainants' favor against each of these joint tenants? Manifestly not. In a petition to contest a will, or to establish a will, or to construe it, all the parties must be before the court or nothing can be done. There can be no separate controversy between the plaintiff and any one of the defendants. The reason is that the thing in issue is the validity or the construction of the paper, the will or the contract, as the case may be, and the court cannot construe it by piecemeal. The thing in issue is in its very nature "one and inseparable," and for that reason there can be no separate cause of action or separate controversy. *Fraser* v. *Jemison,* 106 U. S., 191; *Anderson* v. *Appleton,* 32 Fed. Rep., 855; *Reed* v. *Reed,* 31 Fed Rep., 49; *Security Co.* v. *Pratt,* 66 Fed. Rep., 405. So in proceedings in probate to sell lands to pay the debts of a decedent, there can be no separate controversy. In a suit for partition all the parties are in the nature of things necessary parties, and none of them can claim a separable controversy with the plaintiff. *Hanrick* v. *Hanrick,* 163 U. S., 198.

So in the case at bar the defendants both claim through the same muniments of title—to wit, the Kent deeds—and it is sought here to cancel them.

Both defendants are interested in maintaining the integrity of these Kent deeds, and complainants are interested in having them canceled, not in part, but *in toto.* The thing that the suit is directed against is the deeds under which both defendants claim. The thing in issue as between complainants and defendants is one and inseparable—viz., the deeds. Can it be contended that complainants have a separable controversy with either of the defendants? If the complainant had filed a bill against Day alone to cancel these deeds, would the court have granted any relief? We think not. We insist that the

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court could not and would not attempt to cancel a deed, will, contract, or any other instrument by piecemeal. Else in one case we might have the anomalous proposition presented of the same court at different times, and under different proof and pleadings, pronouncing the same instrument both good and bad. This cannot be. The deeds are valid as a whole or else they are invalid. We insist that the nature of the thing in controversy is such as to preclude the possibility of a separable controversy.

Argued orally by *Garner W. Green,* for appellant.

WHITFIELD, C. J., delivered the opinion of the court.

The bill in this case was filed by L. F. Graham, S. H. Kirkland, citizens of Scott county, and Mrs. B. F. Oatis, a citizen of Copiah county, Mississippi, against R. N. Day, a citizen of Minnesota, averred in the bill to be domiciled in New Orleans, La., and the Kreutzer-Winton Company, a corporation of Mississippi, domiciled in Scott county, Mississippi. The bill was one to remove clouds from title. It averred the complainants to be the legal owners in fee simple of certain lands, and charged that the defendants set up some claim to the same, and prayed a cancellation of the defendants' title. It appears on the face of the bill that the title of both complainants and defendants rests upon the validity of a tax title made in pursuance of a sale for taxes on the 6th of May, 1861, by W. H. Rogers, tax collector of Scott county, at which A. B. Smith, the father of two of the complainants, became the purchaser. It further appears from the bill that the Kreutzer-Winton Company claims an undivided one-half interest in said lands under a deed from William C. Winton, and that R. N. Day claims an undivided one-half interest under certain conveyances from the Kents. In all the deeds from the Kents to Day, Winton is a cograntee, these deeds being made in December, 1902; and Winton thereafter conveyed his one-half interest, by deed of

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date April 15, 1903, to the Kreutzer-Winton Company. The Kreutzer-Winton Company filed a disclaimer at the February term, 1903, averring that it did not have any right, title, or interest in any of said lands, but had conveyed all its title in said lands to A. L. Kreutzer and W. C. Winton, and further averring that it, the said corporation, was wrongfully made a party defendant, and that said Kreutzer and Winton were proper and necessary parties defendant, and praying to be discharged. The complainants not having afterwards made the said Kreutzer and Winton parties defendant, R. N. Day filed his petition for removal to the circuit court of the United States for the southern district of Mississippi on the 4th day of November, 1903, accompanying it with the proper bond. The complainants thereupon, without offering any evidence upon the motion, took the rather unusual course of demurring to the petition for removal, resting the demurrer upon three grounds: First, because the United States circuit court had no jurisdiction; second, because the state court had exclusive jurisdiction; and third, because, upon the face of the pleadings, it appeared that the cause of action was not a separable one. The court sustained this demurrer, expressly setting out that it did so as a matter of law on the face of the pleadings, holding the cause not to be properly removable. The defendant Day excepted, and brings the case to this court.

The first two grounds of demurrer are disposed of adversely to appellee's contention by the very clear and accurate opinion of Shelby, J., *in Pine Land Co.* v. *Hall,* 105 Fed. Rep., 88 (44 C. C. A., 363, decided in 1900). The complainants, having chosen to demur, cannot aid themselves here by reference to what evidence would show. Looking, therefore, to all the pleadings, the state of the case made for our decision is this: That the complainants were all citizens of Mississippi, and the corporation having disclaimed and been eliminated from the suit, and Kreutzer and Winton not having been made parties defendant, R. N. Day appears as the sole defendant at the time

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the petition for removal was filed, and, indeed, so appears from the filing of the disclaimer by the corporation in February, 1903, some ten months before the petition for removal was filed, during all of which time complainants had failed to make Winton and Kreutzer defendants. It is said by counsel for complainants that the diversity of citizenship necessary to removal must exist both at the time when the action was begun in the state court and at the time when the petition for removal was filed. This is true, but what is meant is, not that mere allegations in the pleadings should so show, but that in fact and in truth the diverse citizenship did so exist. See, to this effect, *Anderson* v. *Watts,* 138 U. S., 694 (11 Sup. Ct., 449; 34 L. ed., 1078). And because this is so the better practice is to meet the petition for removal with evidence, and not to demur. Complainants, however, insist that, looking, as we must on demurrer, to the face of the pleadings alone, the corporation appears to be a resident defendant both at the time of the filing of the bill and at the time of the petition for removal, and that it is not competent to change the situation of the cause as a removable one by having the corporation disclaim interest and retire from the suit. It is said on this point in Black's Dillon on Removal of Causes, p. 132: "It has sometimes been held (principally by the state courts) that, although the action, as originally commenced, is not wholly between citizens of different states, yet if it is so changed by striking out parties, or by a release or disclaimer on the part of some of the defendants, that thereafter it remains between parties all of whom possess the requisite citizenship, a removal may then be had;" citing cases from Georgia, Texas, and Massachusetts. See especially, as expressing our view, the Massachusetts case, *Danvers, etc.,* v. *Thompson,* 133 Mass., 182. The editor then adds: "But these rulings do not seem to be consistent with the decisions of the United States supreme court to the effect that the federal jurisdiction depended upon the condition and citizenship of the parties at the time of the institution of the suit in

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the state court;" citing *Anderson* v. *Watts, supra.* But we think the rule announced in the decisions of the state courts referred to is not in conflict with the holding of the United States supreme court. We think the editor, Mr. Black, takes too narrow a view of those decisions. We have examined all the cases which have been referred to by counsel for appellee, and others, and we do not think it can be properly gathered from the federal decisions that the rule adopted by the state courts referred to would not be pronounced the correct rule by the United States supreme court. To our minds, it is the reasonable and sound view. The court is to deal with the real parties to the litigation, not those who disclaim interest and retire from the contest; and certainly with reference to those real parties the question of removal on the ground of diversity of citizenship should be decided.

It results from these views that the demurrer should be, and is hereby, overruled, and the cause remanded for further proceedings in accordance with law.

GEORGE W. RHYMES v. JACKSON ELECTRIC RAILWAY, LIGHT AND POWER COMPANY.

1. PRACTICE. *Peremptory instruction.*

   A peremptory instruction should not be given for the defendant if the state of the evidence be such that the court would not vacate a verdict predicated thereof in plaintiff's favor.

2. STREET RAILROADS. *Negligence. Motorman.*

   A motorman who allows his car to run down a sharp grade, past a number of persons engaged in picking up packages on the edge of the track, at the place of a recent accident, with no control of the car, and without sounding an alarm, is guilty of such gross negligence as to justify a verdict for injuries to one of the persons engaged, though the latter may be guilty of contributory negligence.

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FROM the circuit court of, first district, Hinds county.

HON. DAVID M. MILLER, Judge.

Rhymes, the appellant, was plaintiff, and the Street Railway Company, the appellee, was defendant in the court below. From a verdict, predicated of a peremptory instruction, in defendant's favor and a judgment thereon, the plaintiff appealed to the supreme court.

The facts are fully stated in the opinion of the court.

Harris, Powell & Harris, for appellant.

It would seem that a bare statement of the facts would be a sufficient argument to show that the learned court below erred and that at best the case was one for the jury. The defendant had no more right to the street than the plaintiff. Joyce on Electric Law, sec. 570; Croswell on Law of Electricity, sec. 740 *et seq.*

In using the street under the facts and circumstances shown in this case, vigilance was not only a moral, but a legal, duty of the defendant.

It might be that in sparsely settled portions of the city, or where the streets were clear of vehicles and pedestrians, it would not be negligence to run at a speed of eight miles an hour without sounding a gong or keeping a lookout or keeping hold of the brake, even though it were defective; but surely, to do these things when the street was filled with people, with a wrecked wagon within three feet of the track, with the attention of the people directed to the wreck and their hearing dulled by the roar of many voices talking all at once, was gross and reckless negligence amounting to willful wrong. Surely the motorman ought to have seen that the attention of the crowd was diverted by the wreck and their hearing impeded by the assembled voices; surely he ought to have known as a matter of common knowledge that excited crowds sway back and forth; certainly he ought to have seen the appellant between the track and the wreck in less than three feet of the track, with his back

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turned to the track, busily engaged in loading the vehicle, with the crowd gathered around him, and that it would be a close shave to pass him; or, if he did not see appellant thus engaged, he must have known that some one was so engaged and could not be on the lookout for danger. Under such circumstances the highest care is due. *Montgomery* v. *Lansing Elec. Ry. Co.*, Mich., 1894 (5 Am. Elec. Cas., 471); Joyce on Electric Law, sec. 575; Croswell on Law of Electricity, sec. 741, note 1, *et seq.*

The motorman, presumably, as he approached the crowd, was cool and collected, and could take in the whole situation; while appellant, with his hands and eyes upon his work and the roar of the crowd in his ears, had no such advantage. We submit that under these circumstances to take one step backward as he finished his job before looking up was not negligence, but the same thing would have been done by the average prudent citizen similarly situated; or, if this was negligence, still the company's servants were guilty of such gross negligence as that mere negligence would be no defense. *Railroad Co.* v. *Brown*, 77 Miss., 338; *Stevens* v. *Railway Co.*, 81 Miss., 195.

The use of the defective brake under the circumstances surrounding this case was in itself, and of itself, gross negligence. Joyce on Electric Law, sec. 465; *Uggly* v. *Street Ry. Co.*, 160 Mass., 351 (4 Am. Elec. Cas., 389); *Thompson* v. *Rapid Transit Co.*, 40 L. R. A., 172.

Williamson & Wells, for appellee.

We are fully aware of the fact that the rule as to the care required of a foot passenger crossing a steam railroad track, that he must "stop, look, and listen," cannot be applied in all of its strictness, or applies only in part, to pedestrians crossing street railroad tracks at intersecting streets, especially in crowded cities, it being the duty of railway companies to have the cars under control as they approach such crossings, and the pedestrian having the right to assume that those operating the

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cars will slow down on approaching a crossing. But, even under such circumstances, there is always the duty to look for an approaching car, and, if the street be obstructed, to listen and, in some instances, to stop, and a plaintiff must be held to have seen that which is obvious; so where it appears that the plaintiff, in crossing a street, is struck by a street car just as she stepped upon the track, the view of which was unobstructed, the court properly instructed the jury that she was guilty of contributory negligence. *McCauley* v. *Phil. Traction Co.*, 13 Pa. Sup. Ct., 354.

In many jurisdictions it is held that one attempting to cross a street railway track on foot is bound to look in both directions for an approaching car, and to listen, if there is any obstruction, and that his neglect to do so is negligence *per se.* 150 Pa. St., 180; 44 La. Ann., 509; 49 La. Ann., 1302; 201 Pa. St., 247.

Even in those jurisdictions where it is held that it is not the absolute duty of the pedestrian to look and listen in every instance where he undertakes to cross the tracks of a street railroad, it may still be determined that as a matter of fact, in some situations, the exercise of ordinary care and prudence would require the traveler to look and to listen before crossing the tracks of a street railroad. 95 Me., 115; 60 N. J. L., 312; 110 Fed. Rep., 496; 74 N. Y. Supp., 599; 177 Mass., 416.

This duty, when required either as a matter of law or as a matter of fact, should be exercised when and where it will be reasonably certain to effect its purpose; neither will the misconduct of the railway company excuse the non-performance of this duty. 108 Wis., 593; 110 Wis., 331; 53 Atl., 433; 59 Mo. App., 668; 60 Minn., 119.

One is, as a matter of law, guilty of such contributory negligence as will preclude recovery for injuries sustained by being struck by a street car where he neglected when two or three feet from the track to look in the direction of an approaching car in plain view, although he did look when about twelve

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feet from the track, but could not see the car because his view was obstructed by a horse and covered wagon standing backed up to the curb of the street. *Doherty* v. *Detroit Ry.*, 118 Mich., 234; *Henderson* v. *Greenfield,* 172 Mass., 542.

One walking at a place between street crossings, behind a wagon driven on one of two street railway tracks, which prevented him from seeing a car approaching on the other track, is guilty of such contributory negligence as will prevent recovery, in stepping upon the other track without looking to see whether a car is approaching on the same. *Bethel* v. *Street R. Co.,* 15 Ohio C. C., 381.

One who attempts, in the middle of a block, to cross a street railway track immediately behind a car, without looking for a car coming from the other direction on the further track, is guilty of such negligence as will preclude recovery for injuries sustained by collision with such car. *Burgess* v. *Salt Lake R. Co.,* 53 Pac., 1013.

One who attempted to run diagonally across an electric railway track immediately in front of an approaching car, which he could have seen if he had looked, has been held guilty of such contributory negligence as will prevent a recovery for his death. *Doller* v. *Union R. Co.,* N. Y. Supp., 770.

A person exercising due care in looking for approaching vehicles has a right to cross a city street at any point without being chargeable with contributory negligence, yet he is chargeable with negligence if he sees an approaching car, or could have seen one by the exercise of reasonable care, and does not take proper steps to avoid it. *McClain* v. *Brooklyn City R. Co.,* 116 N. Y., 459; *Adolph* v. *Central Park R. Co.,* 76 N. Y., 530; *Davenport* v. *Brooklyn City R. Co.,* 100 N. Y., 632.

One who attempts to cross a street car track in front of a car running seven miles an hour, when it is only a few feet distant, is guilty of contributory negligence, although the company was also negligent. *Watson* v. *Mound City R. Co.,* 34 S. W., 573.

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Brief for appellee.

Where a pedestrian is standing near a car track at night, upon a frequented thoroughfare, giving no indication of an intention to cross and attempts to cross only when a rapidly moving car is so near him as to render it practically impossible for the motorman to prevent striking him, there can be no recovery for injuries sustained. *Knoker* v. *Canal, etc., R. Co.,* 52 La. Ann., 806.

One unloading a wagon at a point so near the track as to expose himself to danger, who knew that the cars were continually passing, cannot recover for injuries sustained. *Davis* v. *People's R. Co.,* 159 Mo., 1.

Contributory negligence is the want of ordinary care to avoid injury from the act of another. One who contributes directly to his own injury by a failure to use due care, which would have saved him from harm resulting from the negligence of another, cannot recover. *Railroad Co.* v. *McGowan,* 62 Miss., 682; *Railroad Co.* v. *Alexander,* 62 Miss., 496.

Nothing less than wanton, reckless, or intentional negligence on the part of the defendant, alleged and proved, is sufficient to overcome the contributory negligence of the plaintiff. *Jones* v. *Ala. Mineral R. Co.,* 107 Ala., 400.

Applying the above principles of law to the facts of the instant case, it is readily seen that at the close of the plaintiff's testimony it was entirely proper that the court should have sustained the motion to exclude the evidence, which was done.

The plaintiff, according to his own and the testimony of his other witness, was standing in the street, between the railway track and the curb, engaged in assisting Sam Proctor in reloading the express wagon, at the very time when the car of the defendant came along on its track, which was free and unobstructed. There was nothing in the acts of the plaintiff, as testified to by him and the other witness, to indicate that the plaintiff had any idea of crossing the track of the railway; and, in fact, the testimony shows that he had no idea of doing so

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until he was requested to go across the street to get the safe. At this time the street car was immediately upon the scene, and Sam Proctor, on looking up, saw the car just in time to avoid being struck by it as he passed upon the track. The testimony shows that there was no obstruction of any kind to obscure the vision of the plaintiff if he had only looked. His eyesight was good. All of the persons who had gathered around the wagon out of interest or curiosity were on the outside of the track, between the curb and the railway track, and Sam Proctor says that there was nothing to have prevented the plaintiff from looking and seeing the car and escaping injury, as was done by Proctor, but that plaintiff did not look and walked upon the track and was instantly struck by the car. There was an effort made by the testimony to prove some neglect on the part of the motorman by the fact that he was not ringing his bell, and that the car was running at a dangerous rate of speed, but the effort fails wholly, for the reason that the witness, even under the most leading examination, refused to estimate the speed of the car at more than eight miles per hour, which he said was the usual and customary speed of the cars, and there was nothing shown by the evidence which required the motorman to ring any bell or sound any alarm. The track was clear, it was in the middle of a block, and no indications existed to put him on notice that any person would undertake to cross the tracks. The plaintiff himself said that he did not look; that he knew of the frequent passage of the cars on the track, having been familiar with the surroundings for four years; and that he undertook to cross the track in the middle of a block, not at a crossing, when the car was right at him, without even so much as raising his eyes to see whether or not he could, with reasonable safety, go upon and across the tracks.

Argued orally by *J. B. Harris,* for appellant, and *Ben H. Wells,* for appellee.

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CALHOON, J., delivered the opinion of the court.

In this case, which is an action for damages for personal injuries from being struck by a street car of the appellee company, no evidence was offered by the company, but the court sustained its motion to exclude the evidence introduced for the plaintiff and for a peremptory instruction to the jury to find for the defendant. In this situation, the question is whether the court would or should have set aside a verdict if found for the plaintiff on the testimony offered for him.

The case shown is that the delivery wagon of an express company had cast a wheel, and was broken down and turned over on its side on the street car track, and the horses had run away. Express packages were scattered around, and the safe for valuable packages was sent across the street to a store for safety. A considerable crowd collected at the scene of the accident, one of whom was Rhymes—a citizen not connected with the express company or the street car company. He, with others, immediately proceeded to right up the wagon, get it off the track, and pick up and put back into it the scattered packages. While they were so engaged, the horses had been caught and rehitched to the wagon. The rear end of the wagon was north of the track, and but three feet from the street car track, and into this rear end Rhymes and one Proctor had just put the last package—a large crate of hats—when they were asked to go across the street to the store for the safe, which was south of the track. Rhymes turned to do so, and, as he turned, was struck by the part of the car jutting over the track, and dragged some distance. He does not think he made a step, but may have made one. He could have seen the car if he had looked. The scene was in a broad street, and the car track was in its center, with a straight view for one hundred yards. The car was running west, and down a steep grade, moving from eight to ten miles an hour; and the motorman was not looking down his track, but at the crowd along its edges, did not have his hand on his

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brake, according to custom, did not slow up or sound any alarm, and said at the time: "My old brakes ain't any account."

Under this presentation of facts, we think the case should have been left to the jury to determine whether, with his preoccupation and his surroundings, plaintiff was guilty of contributory negligence, and, if he was, whether the motorman was not guilty of such gross negligence as to make recovery by the plaintiff proper.

The degree of care required of motormen of electric cars varies with varying situations and circumstances, and what would be slight or no negligence in some conditions might well be regarded as gross in others. Running down a sharp grade, in the daytime, with the unusual spectacle of a throng of preoccupied people on the edge of the track at the scene of a recent accident, with no control of the car, and without sounding an alarm, would be gross negligence, and such as would justify a verdict for damages notwithstanding the act of the plaintiff. He shows such a case by his witnesses, and unless it is varied by evidence for the company, it warrants the jury in a verdict for plaintiff.

Montgomery v. *Lansing, etc.* (Mich.), 61 N. W., 543 (29 L. R. A., 287), cited by counsel, is precisely in point, and we approve and follow it. *Thompson* v. *Salt Lake, etc.* (Utah), 52 Pac., 92 (40 L. R. A., 172; 67 Am. St. Rep., 621).

Reversed and remanded.

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WILLIAM C. SULLIVAN v. STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Murder. Conspiracy. Instruction.*

   The principle that where parties combine to commit crime the law imputes the guilt of each to all thus engaged and holds all to be guilty of any crime committed by either in the execution of the common purpose is founded upon the idea that a common intent to do some unlawful act existed in the minds of the parties prior to the commission of the crime which results from the combination; hence an instruction which seeks to apply the principle in the absence of evidence of such common intent to do an unlawful act is erroneous.

2. SAME. *Self-defense.*

   Where in a murder case the defense is not predicated of self-defense it is erroneous to give an instruction to the effect that self-defense can only be availed of under certain circumstances of which there was no evidence.

3. SAME.

   On prosecution for murder in a difficulty between deceased and defendant and his son, an instruction authorizing conviction if the son killed deceased, not in necessary self-defense, if defendant aided in such killing, though deceased provoked the difficulty with defendant or the son, provided deceased was fighting with his hands only, was erroneous.

FROM the circuit court of Smith county.

HON. JOHN R. ENOCHS, Judge.

William C. Sullivan (commonly called Bill Sullivan), the appellant, and Andrew Jackson Sullivan (commonly called Jack Sullivan), father and son, were jointly indicted for the murder of Wilson Sullivan, a brother of appellant. A severance was had, and appellant separately tried, convicted, and sentenced to the penitentiary for life, from which conviction and sentence he appealed to the supreme court. The facts are stated in the opinion of the court.

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W. H. Hughes, and *McIntosh Bros.,* for appellant.

All the evidence in this case taken together is not sufficient to sustain a verdict of guilty. There is no testimony anywhere in the case showing that appellant ever struck deceased or ever aided or abetted or encouraged A. J. Sullivan to strike him; no testimony showing or tending to show that appellant had the least intimation or idea from any source that A. J. Sullivan there in the dark was making a deadly assault with a knife upon deceased; no testimony showing or tending to show that appellant was armed with a deadly weapon. On the contrary, appellant's uncontradicted testimony is to the effect that he did not touch deceased, did not aid, encourage, or abet the killing in any manner, and did not know that A. J. Sullivan was cutting deceased until after the difficulty was over, when they had started home and Jack told him; that he cherished no malice toward his brother, but, on the contrary, loved him better than any of his other brothers. Under the facts, the court should have sustained the motion of the defendant to suppress the testimony and for a verdict of not guilty.

The first instruction given for the state is erroneous because it tends to center the minds of the jury upon a question not in issue—viz., whether or not Wilson Sullivan was killed in self-defense. The same error occurs in instructions 3, 4, 5, and 6 given for the state. *Spradley* v. *State,* 31 South. Rep., 534; *Layton* v. *State,* 56 Miss., 791; *Parker* v. *State,* 55 Miss., 414.

Instructions 1 and 3, if proper at all, are too narrow. Accused certainly had a right to defend the person of his son, A. J. Sullivan, if there was a reasonable ground to apprehend a design on the part of deceased to do the son some great personal injury. Code 1892, § 1152.

Instructions 1, 2, 3, and 4 have no bearing upon this case, do not enlighten the jury as to the law on the issues involved, and should not have been given.

The fifth instruction tells the jury that if either one of the parties (meaning appellant or A. J. Sullivan) sought and pro-

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voked a difficulty with Wilson Sullivan, armed with a deadly weapon, intending to use it in such a difficulty if it should become necessary to overcome Wilson, and the other of the accused—that is, Bill or Jack—was present for the purpose of encouraging, aiding, or abetting such party in executing such intention, they are equally guilty under the law. Mark the words "present for the purpose."

It is not enough that defendant be present and have in his mind a felonious purpose. This does not constitute in any case the crime of murder. According to this instruction, defendant may have been present, and his purpose for being present may have been to aid, assist, or encourage the commission of the crime. Yet he would not necessarily be guilty of murder. He must affirmatively abet, assist, or encourage the act. He cannot be guilty of murder unless he does something that causes or helps to cause the murder. The formed purpose in his mind is not the crime. *State* v. *Cox,* 65 Mo., 29; *State* v. *Douglas,* 44 Kan., 626; *White* v. *People,* 32 Am. St. Rep., 196; *Burrel* v. *State,* 18 Tex., 713; *Watson* v. *State,* 28 Tex. App., 34.

J. N. Flowers, assistant attorney-general, for appellee.

There was no necessity for the killing, and it was a crime. Whisky was the cause of it, no doubt. The evidence is sufficient to support the verdict.

It is true, as a proposition of law, that if Jack Sullivan killed Wilson Sullivan under circumstances which made the killing murder, and this appellant was present for the purpose of aiding and abetting, he is guilty also. Presence and intention to aid is participation. *McCarty* v. *State,* 26 Miss., 299; *Wynn* v. *State,* 63 Miss., 260.

Argued orally by *W. H. Hughes,* and *D. A. McIntosh,* for appellant, and by *J. N. Flowers,* assistant attorney-general, for appellee.

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TRULY, J., delivered the opinion of the court.

W. C. Sullivan and A. J. Sullivan were jointly indicted for murder. Appellant was tried separately, convicted, and appeals.

The fifth instruction for the state is as follows: "The court instructs the jury that it is not necessary that a previous conspiracy between Bill and Jack Sullivan should have been formed in order that both of the parties, Bill and Jack Sullivan, might be guilty of the crime charged against them in the indictment. For if either one of them sought and provoked a difficulty with Wilson Sullivan, armed with a deadly weapon, intending to use it in such difficulty if it should become necessary to overcome Wilson, and the other of the accused—that is, Bill or Jack—was present for the purpose of encouraging and aiding or abetting such party in executing such intention, they are equally guilty under the law; and if such difficulty was provoked, and a knife, a deadly weapon, was used by Jack Sullivan in such difficulty, and Wilson Sullivan killed, not in necessary self-defense, then Jack Sullivan and any one so present encouraging or aiding or abetting him are guilty as charged." This instruction was not applicable to the facts of the case, and the proposition of law which it was intended to announce was incorrectly stated. The testimony, considered as a whole, so far as disclosed by a most meager record, shows: Appellant and deceased, Wilson Sullivan, were brothers. On the night of the fatal difficulty a social gathering was held at the residence of the deceased, to which appellant, his family, and other neighbors were invited. While there, several of the guests engaged in convivial drinking, the appellant, at least, to excess. There was no evidence of any bad feeling existing between appellant and deceased that night. The last words uttered by appellant before leaving the house were in returning thanks to the family of his host for their hospitality. He then rode off in the direction of his home, and had proceeded some distance, probably three hundred yards, down the road, when he came

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to where the deceased and one or more men were standing. Here a difficulty arose between appellant and deceased, the actual details of which are very vaguely stated in the record. It is beyond dispute, however, that at the time the fight between appellant and deceased began, and for some minutes thereafter, A. J. Sullivan, the son of the appellant, was not present at the scene of the difficulty, not having left the yard gate of the premises of the deceased, and that he did not go to the place of the difficulty until he had been notified of what was transpiring and who were engaged in the fight, when, remarking that he would take his "keen cutter" and go down and settle it, he rode rapidly down the road to where his father and the deceased were engaged in a fisticuff, took part therein on behalf of his father, and stabbed and mortally wounded Wilson Sullivan, the deceased. It does not appear with any degree of certainty that either appellant or deceased was armed with any weapon, or that either intended or endeavored to inflict any serious injury upon his adversary. The testimony of the only witness actually present at the commencement of the difficulty, and who left immediately after it started and before A. J. Sullivan arrived upon the scene, was to the effect that the difficulty was provoked by Wilson Sullivan, the deceased, and that he knocked or shoved appellant down at the very commencement of the fight. Nor is there any direct evidence upon which to base a conclusion that appellant expected his son, A. J. Sullivan, to take part in the difficulty, nor that A. J. Sullivan knew or had any reason to suspect that his father would meet with Wilson Sullivan on the road, or that he intended, if he did meet him, to engage in a difficulty with him. Under this state of facts it was error for the court to submit to the jury an instruction which authorized them to find that A. J. Sullivan had provoked a difficulty with Wilson Sullivan or that appellant was armed with a deadly weapon which he intended to use in such difficulty if it should become necessary to overcome him, for the reason that there is no evidence that A. J. Sullivan provoked a dif-

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ficulty with Wilson Sullivan or that appellant was armed with or intended to use a deadly weapon in such difficulty. If there existed no previous understanding between Bill and Jack Sullivan, no common design to commit any unlawful act, this presupposes independent action on the part of each; therefore, even if one of the parties did provoke a difficulty with Wilson in the manner and for the purpose indicated by the instruction, "the other of the accused" could not have been present "for the purpose" of encouraging and aiding or abetting such party in executing "such intention." In the absence of a common purpose, one party could not know the intention of the other, and could not be present for the purpose of assisting in the execution of a plan to which he was not a party and of which he was in ignorance. This instruction is therefore not only not applicable to the facts of the case, but is contradictory in its terms.

The proposition of law controlling, and which it was sought by the instruction under review to present to the jury, and which the state invokes as applicable to this case, is stated in *Lusk* v. *State,* 64 Miss., 850 (2 South., 257), as follows: "Where parties combine to commit crime, the law imputes the guilt of each to all thus engaged, and pronounces all guilty of any crime committed by any in the execution of the common purpose, as one of its natural and probable consequences, even though none of the parties intended at the outset to do the particular thing constituting the crime." So, again, it is stated: "If two or more combine to do an unlawful thing, and the act of one, proceeding according to the common plan, terminates in a criminal result, though not the particular result intended, all are liable." *Peden* v. *State,* 61 Miss., 270. But this principle is founded upon the idea that a common intent to do some unlawful act must exist in the minds of the guilty actors prior to the commission of the crime; it need not be that the design is to commit the particular crime which is subsequently committed, but there must be a preconcerted plan to do some unlawful act. A common purpose being shown, all are guilty

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and are held liable for the acts of any one of his confederates committed in pursuance of such purpose, even though not included in the original plan. If W. C. Sullivan and his son, A. J. Sullivan, had combined to commit any unlawful act on Wilson Sullivan, and in endeavoring to carry such design into execution Wilson Sullivan met his death, then both Bill and Jack Sullivan were guilty of murder. And this would be true even though at the outset neither had intended to take his life, under the reason of the rule stated above.

So, again, if W. C. Sullivan, of his malice aforethought, intending to compass the death of Wilson, provoked a difficulty in the progress of which he incited his son Jack to slay Wilson, then W. C. Sullivan would be guilty of murder, though Jack, in the absence of a previous agreement, would be guilty of manslaughter only. But if there was no preconcerted plan between appellant and his son to commit any unlawful act toward or inflict any injury on Wilson Sullivan, and if the difficulty between appellant and deceased arose upon a mere chance encounter, occurring without previous concert or intention on the part of either, in which neither intended nor sought to take the life of his adversary, and Jack Sullivan recklessly and unnecessarily slew deceased, this would not render appellant guilty of murder, because in such state of case there would exist on his part no intention to commit murder nor to intentionally incite its commission by another. And this would be true, no matter if appellant was the aggressor in the fist fight in which he was engaged with deceased. But the instruction now being considered is not based on any one of these propositions. It permits the jury to convict each of the actors for the act of the other, though each acted independently and without the knowledge of his co-actor. Under the state of facts here presented, the controlling principle of law is stated in *Brabston* v. *State,* 68 Miss., 219 (8 South., 328), as follows: "We recognize that if two or more agree to kill another person or do him great bodily harm, and designedly and knowingly

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coöperate in an effort to accomplish that common purpose, and, in executing that purpose, one of them kill him, all are principals in the homicide, and equally liable in law for it; but we do not hold the doctrine that if two men fight in a crowd, with or without deadly weapons, and some outsider, without concert with or knowledge of either of the two combatants, fire at and kill one of them, as his prejudice or prepossession may prompt, the survivor is responsible in law for the homicide. In such a duel neither party to it contemplates or expects such an interference by others, and most probably did not know of it before or at the time of the fight, and it never came within the contemplation or expectation of either as a result of his combat. In such cases the man who interferes takes the consequences of his act, and he is guilty of a crime, unless he can justify his act on lawful grounds applicable to himself." See also *Jones v. State,* 70 Miss., 405 (12 South., 444). This enunciation is strikingly applicable to the case at bar. If appellant and deceased were engaged in a mutual combat engendered by a chance controversy, without premeditation on either side, neither intending, nor probably desiring, to inflict any great injury upon his adversary, neither armed with any weapon capable of producing death, and if into this conflict A. J. Sullivan, the son of the appellant and nephew of deceased, precipitates himself, without any previous understanding with appellant, armed with a deadly weapon, and slays the deceased, under such circumstances it would be monstrous and shocking to the sense of justice to hold the appellant responsible for the deed committed by his son, whose assistance he had not expected and whose act he neither desired nor could foresee. As to the degree of guilt of A. J. Sullivan, it is not necessary to discuss, he having been by death summoned to answer, for the deeds done in the body, at the bar of justice of a higher tribunal. It is not enough to justify the conviction of appellant for murder to show that he was engaged in a combat with deceased, in the course of which murder was committed by his son. It must further be

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shown that such murder was intentionally incited in some way by the appellant, or that it was committed in pursuance of a common design. In the case of *Woolweaver* v. *State,* 50 Ohio St., 277 (34 N. E., 352; 40 Am. St. Rep., 667), a case of practically identical facts, where the father, being engaged in a difficulty, has his adversary slain by his son, it is said: "Whenever a father engages in a fight, the tendency of that act is to incite a son, who may be standing by, to acts of violence, either toward the immediate antagonist of the father, should there be one, or toward the party of that antagonist, if there should be more than one. This tendency may be affirmed in respect to many other ties of kindred, or in many instances of merely close companionship. What rash or violent act the bystanding son, kinsman, or comrade may be moved to do, depends in a great measure upon the quality of his temper, the strength of his affection, and the notion, often mistaken, that he may hastily gather under the excitement of the moment, as to who is in fault and to be held responsible for bringing on the conflict. And if the bystanding son, other kinsman, or comrade should, of his own volition, by an independent act of violence, slay the antagonist, the party engaged in the fight should not be charged with this act merely because he was engaged in a conflict with the deceased, and in that way, but in that way only, incited the fatal act. This is not enough to show a criminal intention; something more must appear. He must have purposely incited or encouraged the party in that course of violence that led to the homicide, or done some overt act himself with a view to that result, and that in some degree contributed thereto." To the same effect see *Jordan* v. *State,* 79 Ala., 9; *Manier* v. *State,* 6 Baxt., 600; *Tharpe* v. *State,* 13 Lea, 143; *Hicks* v. *U. S.,* 150 U. S., 442; 14 Sup. Ct., 144; 37 L. ed., 1137.

The sixth instruction for the state is also fatally erroneous. It authorizes the jury to convict appellant if they believe that Jack Sullivan killed Wilson Sullivan, not in necessary self-defense, if the appellant aided, encouraged, abetted, or assisted

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in such killing, even though they might further believe that Wilson Sullivan began or provoked the difficulty with Bill and Jack, or either of them, provided he was fighting Jack with his hands or fists only. It was tantamount to saying that one could provoke a difficulty and engage in a fight of which he was the aggressor, and if in the course of such fight he is killed by the party whom he unlawfully assaulted, that then any third person who might assist or encourage the party so assailed would be guilty of murder, even though he might not intend to slay or desire the one whom he was aiding to slay. We cannot imagine a state of case which would warrant the granting of such a charge to the jury. A man unjustly assailed has the right to defend himself, and if in defending himself he, in the heat of blood engendered by the combat, uses more force than is necessary in repelling such attack, he would be guilty of manslaughter, not murder. Under such circumstances it cannot be contended that a father who is assisted by a son in defending himself from assault, being himself unarmed, and not the provoker or aggressor in the difficulty, and with no previous understanding with his son, could possibly be justly convicted of murder. This was the legal effect of the sixth instruction for the state.

The third instruction for the state was, under the facts of this record, improperly granted; though, but for fatal errors pointed out in other instructions, we would not for this alone reverse; and it is mentioned to avoid a repetition of the error upon a subsequent trial. Appellant had not invoked, and his defense was not predicated on, the doctrine of self-defense, and an instruction telling the jury that self-defense could only be availed of as a defense under certain circumstances, which manifestly were not present in the case at bar, could have no good effect, and simply tended to lead the jury away from the vital points at issue.

The action of the court in refusing the instructions denied the defendant was correct. The fourth is plainly wrong. The

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seventh and eleventh are on the weight of evidence. The second, third, and eighth are based on the erroneous assumption that appellant was entitled to an acquittal unless he aided or abetted Jack Sullivan with knowledge of his plan to "kill and murder" deceased and with the intention of compassing such killing. The real inquiry on this phase of the case, as the record is here presented, is whether deceased came to his death in the prosecution on the part of appellant and Jack Sullivan of a common design to commit an unlawful assault upon him. If this inquiry be answered affirmatively, appellant is guilty of murder, without reference to the exact nature of the unlawful act which they intended to commit. And this is true even though Jack Sullivan alone actually committed the homicide in pursuance of such common purpose, if appellant was present aiding, abetting, or inciting such killing by word or deed. The correctness of this last proposition was recognized by the trial judge in his correct modification of the instruction marked "No. 9" granted appellant.

We deem it unnecessary to discuss in detail the other assignments of error presented.

As the errors which necessitate a reversal hereof all flow from the application of a wrong principle of law to the facts as they appear to us in this obscure record, and as we have hereinbefore indicated the true course to be followed, we think this sufficient for the guidance of the court on another trial hereof.

Reversed and remanded.

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GEORGE S. LEATHERBURY, JR., ET AL., v. MURDOCK MCINNIS.

1. **CHANCERY PRACTICE.** ***Waste. Co-tenants. Injunction.***
   One tenant in common is entitled to an injunction against his co-tenants to restrain unusual and unreasonable waste, indicating malice and tending to destroy the chief value of the land.

2. **SAME.** ***Limitation of injunction.***
   Where one tenant in common has enjoined his co-tenant from destroying timber which covers the entire tract and constitutes its chief value, and there is no showing that the timber on one part of the tract is of more value than that on any other part, the injunction should be limited so as to restrain the defendant only from destroying more trees than such proportionate part thereof as corresponds with his interest in the land.

FROM the chancery court of Greene county.

HON. STONE DEAVOURS, Chancellor.

The appellee, Murdock McInnis, was complainant, and the appellants, George S. Leatherbury, Jr., *et al.*, were defendants in the court below.

The bill alleged that complainant was the owner of an undivided half interest in the land described in the bill aggregating one thousand and forty acres, which was only valuable for the pine timber on it, and defendants had entered upon a portion of it, and were boxing the trees for turpentine, and that the boxing of the trees was an irreparable injury to the land, and prayed for an injunction restraining defendants from boxing the timber for turpentine. Defendants answered the bill, denying the material allegations thereof, and made a motion to dissolve the injunction which had been granted. The motion was heard on bill, answer, and affidavits. The affidavits were in large part the opinions of the parties making them, as to the effect of boxing the trees for turpentine purposes, one witness stating that he had heard one of the defendants say they in-

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box all the land. The court overruled the motion to dissolve the injunction.

Ford & White, for appellants.

Here is a case where the defendants to an injunction bill, who confessedly own an undivided one-half interest in the lands, who are not alleged to be insolvent, but affirmatively appear to be worth ten times the entire value of the whole tract of land, and who are in possession claiming title to the whole, who are absolutely, by operation of an injunction writ, in advance of any trial of title, lifted out of possession even of the half interest they own. We insist that the case viewed in its weakest light for the appellants falls as clearly as it is possible for a case to fall within the rule announced by this honorable court in the recent case of *North Lumber Co.* v. *Gary,* 83 Miss., 640 (s.c., 36 South. Rep., 2). It is a bill asserting ownership of an undivided one-half interest only, that does not seek to adjust or settle equities, seeking to perpetually restrain the cotenant from using any part of the common property.

But conceding that complainant is the owner of an undivided one-half interest in the lands—which, however, the court is not warranted by this record in doing, and we insist the action of the lower court in maintaining this injunction is more erroneous than before—the court will observe that the bill describes over one thousand acres of land, all of which is averred to be pine timbered lands; and that the defendants, as appears by the answer, had boxed but one hundred and twenty acres of the common property, viewing it in the light of a tenancy in common, which is the greatest interest appellee can possibly have. There is no pretense that the particular one hundred and twenty acres boxed contained more than an average quantity of timber, or anything that gave that small portion an exceptional value, so as to render it impossible, in the adjustment of equities, to set it apart to defendants in a partition. But the position of appellee in the court below, and the learned

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chancellor in passing on the motion responded directly to the remarkable proposition, that one tenant in common could not use any part of the common estate or property for an exclusive or personal use, and that equity would restrain any use that was not a joint use and for the equal benefit of all the owners. We insist that this is not the law, and that the true rule is that one tenant in common may make any use he pleases of a part of the common property, provided he does not use in excess of his *pro rata* share of the common property. 1 High on Injunctions, sec. 693; *Mott* v. *Underwood,* 149 N. Y., 463 (s.c., 51 Am. St. Rep., 711).

C. H. Wood, for appellee.

Appellants rely upon the case of *North Lumber Co.* v. *Gary,* 83 Miss., 640 (s.c., 36 South. Rep., 2), to support their contention. This case is not analogous to the one before the court. In that case the party claimed the whole ownership of the land in dispute, while here it is proven that the defendants have only an undivided half interest in the lands. The trespass committed in the case cited was months before the suit was begun, and it was a very grave question whether the North Lumber Co. or Gary owned the lands upon which the trespass had been committed.

The parties here are co-tenants, and the bill is not to try the right of title to the lands, but to enjoin the co-tenants from continuing the trespass and thereby depreciating the value of the land. Complainant seeks for an accounting for the damage already done and for the prevention of further damage which he alleges and proves will be done to the lands; that it cannot be estimated by computation what damage is done to lands by boxing and scraping the pine timber thereon. "An owner of an undivided half interest in timbered lands cannot cut the timber off without the consent of his co-tenant, and may be enjoined from the commission of such trespass." *Cotton* v. *Christian,* 34 South. Rep., 597.

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In the case of *Eskridge* v. *Eskridge,* 51 Miss., 522, this court held that where there is a relief at law, it is not sufficient to defeat the jurisdiction of equity. *Richardson* v. *Brooks,* 52 Miss., 118; *State* v. *Brown,* 58 Miss., 835.

"In case of continued and repeated acts, though each alone is a subject of a suit for damages, relief may be had by bill for injunction, and an accounting for profits realized by the wrongdoer." *Warren Mills* v. *N. O. Seed Co.,* 65 Miss., 391; *Avera* v. *Williams,* 81 Miss., 716.

The defendants in the court below declare in their answer that they intend to continue to box and scrape the pine timber on all the land in dispute. How are we to prevent these repeating and continuous acts of trespass unless by a writ of injunction? "Equity has jurisdiction to compel accounting for trees cut and will enjoin the trespass." *Gulf Red Cedar Co.* v. *Crenshaw,* 35 South. Rep., 50.

This court says: "Where irremedial mischief is done or threatened to be done, going to the destruction of the substance of the estate, such as extracting ore from mines or cutting down timber, the rule is to issue the injunction, though the title to the premises be in litigation." *Woods* v. *Riley,* 72 Miss., 73.

One tenant in common cannot maintain ejectment against his co-tenant without proving ouster. *Harmon* v. *James,* 7 Smed. & M., 111.

"In equity alone can the rights of tenants in common be adjusted." *Fowler* v. *Payne,* 49 Miss., 32.

WHITFIELD, C. J., delivered the opinion of the court.

The appellants and appellee appear, so far as the testimony has progressed, to be tenants in common of a tract of land embracing something like one thousand and forty acres. According to the testimony thus far developed, the almost exclusive value of the land consists in the pine trees standing on it. The appellants have boxed the trees on one hundred and twenty acres, and have declared their purpose to box

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the trees on the entire tract. The chancellor must have believed from the testimony that this waste was unusual and unreasonable in its nature, malicious, and tending to the destruction of the chief value of the property. We are not prepared to say that he is clearly wrong in this conclusion of fact, and if the facts be so, then the injunction was properly granted. Freeman on Co-tenancy & Partition, sec. 323. But there is nothing to show that the timber on one part of the tract is of any more value than that on any other part of the tract, and there is no reason why, in partition proceedings, the court could not set apart to the appellants that half of the land embracing the said one hundred and twenty acres. For these reasons, we think the injunction should have been limited so as to restrain the appellants from boxing any more than one-half, in value and quantity, of the trees.

The decree is reversed and the cause remanded, with instructions to the court below to modify and perpetuate injunction as indicated in this opinion.

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JAMES W. REDUS v. ROBERT X. GAMBLE.

1. JUSTICES OF THE PEACE. *Appeals. Bond. Code* 1892, § 82.
Parties against whom judgments have been rendered by justices of the peace are not to be deprived of an appeal to the circuit court, under Code 1892, § 82, regulating the subject, by the ignorance or arbitrary action of the justice of the peace in demanding an appeal bond in a greater penalty than that authorized by the statute.

2. SAME. *Code* 1892, § 84. *Failure to send up record. Power of the circuit court.*
If a justice of the peace, from whose judgment an appeal has been taken, fail to send the record to the circuit court as required by Code 1892, § 84, prescribing his duties in such cases, the circuit court may issue the necessary writ to enforce performance of duty by the recusant justice of the peace.

3. SAME. *Code* 1892, § 89. *Certiorari.*
Such a writ, although commonly called a *certiorari*, is not a *certiorari* within the meaning of Code 1892, § 89, providing that all cases decided by a justice of the peace may be removed to the circuit court by writ of *certiorari* upon the terms therein specified.

4. SAME. *Bond not required. Trial de novo.*
Such a writ may be issued to enforce performance of duty by the recusant justice of the peace without the appellant giving any other than the appeal bond, and when performance of duty by the justice is enforced the trial will be *de novo*.

FROM the circuit court of Tate county.

HON. J. B. BOOTHE, Judge.

Redus, the appellant, was plaintiff in the court below; Gamble, the appellee, was defendant there. From a judgment in the circuit court in defendant's favor the plaintiff appealed to the supreme court.

Redus made an affidavit against Gamble, and brought a civil action against him for damages at the same time, under § 1068,

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Code 1892, for enticing away or knowingly employing his servant or laborer, one Dock Wilkins. He recovered a judgment in the civil case for $68.87, and Gamble was convicted and fined in the criminal case, both cases being tried in a justice of the peace's court. Gamble desired to appeal both cases to the circuit court, and the justice of the peace fixed the amount of the bond for both cases at $400, and gave Gamble a bond partly filled out, which Gamble had signed after the penalty of the bond had been changed to $250, and, on the fourth day after the judgment was rendered, carried it to the house of the justice of the peace and left it with the wife of that officer. The justice of the peace received it the morning of the fifth day after the judgment was rendered, but, because the penalty had been reduced, refused to approve it, and refused to transmit to the circuit court a certified copy of the proceedings in the case in his court. The appellee then filed a petition in the circuit court in the nature of a *certiorari* to compel the justice of the peace to send up the papers and bond. The court granted the petition. Redus made a motion in the circuit court to dismiss the petition because, as he set out in his motion, no bond had been given as required by law; the bond made and tendered in the civil case was insufficient; the old bond could not be filed and approved *nunc pro tunc;* and no bond had been tendered in the civil case. This motion was overruled. The case was docketed and heard *de novo,* and, after the evidence had been concluded, the court gave a peremptory instruction to find for defendant.

J. F. Dean, for appellant.

To obtain a writ of *certiorari* four things are essential and must concur: (1) The application must be made within six months after the case is decided. (2) Good cause must be shown by petition. (3) The petition must be supported by affidavit. (4) In all cases bond must be given as in cases of appeal from justices of the peace.

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Now in this case no bond was given or required. If the bond could be dispensed with by the judge who granted the writ, then the time could be extended beyond the six months prescribed by the statute, and it has been held repeatedly that this was jurisdictional, and that neither appeals nor writs of *certiorari* can be issued after the expiration of the time allowed by law.

Good cause shown by petition could be waived and any verbal statement accepted. Oath need not be required, yet in *Moore* v. *Ernst,* 54 Miss., 642, the court held that the affidavit was necessary and the writ issued without the affidavit would be dismissed upon motion, but that appearance by the opposite party and entering the trial without an objection would be a waiver of the defect. The same statute which limits the time within which the writ may issue, and that requires the petition to be in writing supported by affidavit, also requires that bond be given. Can there be any reason why all the provisions of a statute should be mandatory except one? If there is any difference in this statute, it is in favor of the mandatory character of the requirement for bond rather than for the other provisions. It says: "In all cases giving bond," etc.

At common law the writ was discretionary, and the bond was not necessary, and was also discretionary with the judge issuing the writ. "But many states (Mississippi amongst the number) have statutes requiring bond to be given, and statutes requiring that bonds shall be given before the writ issues are mandatory, and unless the bond is given in compliance therewith the writ will be quashed," which is the equivalent of dismissed. 4 Ency. Pl. & Pr., 187.

But it may be answered that an appeal bond was given, as shown by exhibit with the petition. An appeal bond is not a *certiorari* bond, and in this case was only an exhibit and not a bond. Where a writ of error bond has been given instead of a *certiorari* bond, the writ will be dismissed. 4 Ency. Pl. & Pr., 243.

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Besides, this is begging the question. Whether or not an appeal bond had been given was the very question in issue. The only way the court had of determining whether or not the appeal bond had been given was by writ of *certiorari.* The only way it could grant the writ was on petition showing good cause supported by affidavit after the party praying for the writ had entered into bond as required in appeals from justices of the peace.

Appellant does not pretend to say that the circuit court has not the power to declare the bond tendered to the justice good, sufficient, and valid where the proof shows it to be so. What he contends is that the circuit judge has no right to review the proceedings of the justice of the peace at all until the petitioner has filed his bond as required by the statute. Appellant does not take issue with *Robinson* v. *Mhoon,* 68 Miss., 712. The facts in that case and this are not the same, and there is nothing to show that the petitioner in that case did not give a bond for *certiorari.* It is presumed that he did, as that question was not raised.

N. A. Taylor, for appellee.

Certiorari is the proper proceeding to require the sending up the case to the circuit court by the justice of the peace. "Where the appellant filed his appeal bond within proper time, he cannot be bound by the failure of the justice of the peace to transmit the paper to the county court; but if the papers and transcript be not filed before the first day after the second term after the appeal is perfected, it is the duty of appellants to apply for a writ of *certiorari* to compel the justice to perform his duty. *Jones* v. *Spann,* 3 Civ. Cas. (Tex.) Ct. App., sec. 283.

"A party ready and willing to comply with the prerequisites to an appeal cannot be deprived of his right by the willful or accidental omission of the justice." *Louderback* v. *Boyd,* 1 Ashm. (Pa.), 380; 2 Ashm. (Pa.), 224; 4 Wis., 285.

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"When a justice of the peace neglects to return an appeal bond, appellant should apply to the circuit court to compel him to make the return." *Little* v. *Smith,* 5 Wis., 400.

"Wherever the right of an individual is illegally infringed by the act of a person clothed with legal authority, he may have redress by *certiorari,* unless he can resort to a writ of error." *Delahuff* v. *Reed,* 1 Miss., 74.

"Appeals and writs of *certiorari* are only different modes of getting cases from a court of a justice of the peace to the circuit court, and do not affect the question of jurisdiction." *O'Leary* v. *Harris,* 50 Miss., 13; *Robinson* v. *Mhoon,* 68 Miss., 713.

TRULY, J., delivered the opinion of the court.

The appeal bond in the sum of $250 filed by Gamble with the justice of the peace before the expiration of five days from the rendition of the judgment operated to remove the civil case to the circuit court. This right could not be lost by the failure of the justice of the peace to indorse his approval on the bond. The bond was conditioned as required by § 82, Code 1892, and was in a penalty of more than double the amount of the judgment appealed from, and the sureties are admitted to be perfectly solvent. This is all that the law requires of a losing party who desires to appeal a civil case from a judgment rendered by a justice of the peace, and he cannot be deprived of his right of appeal by the trial justice arbitrarily or ignorantly demanding an appeal bond in a greater penalty than that authorized by the statute and refusing to approve a proper bond tendered in due time. *Winner & Meyer* v. *Williams,* 82 Miss., 669 (s.c., 35 South., 308). The contention of the appellant that the bond was intended to operate as an appeal bond in both the criminal and the civil cases, and is therefore insufficient in amount, is not tenable. This appeal bond was payable to the party who had obtained the judgment, and its conditions are entirely distinct from those required in criminal

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cases under Code 1892, § 86. In civil cases the amount of the appeal bond is regulated by the amount of the judgment appealed from, or the value of the property involved. In criminal cases the penalty of the bond is prescribed by the justice of the peace who tries the case. The one is to secure the payment of any judgment which may be rendered by the appellate court; the other, to insure the appearance of the defendant and the payment of any fine and costs imposed.

The action of the circuit court in issuing the writ commanding the justice of the peace to produce the original papers in the civil case was correct. It was the duty of the justice of the peace, under Code 1892, § 84, to transmit to the clerk of the circuit court a certified copy of the record of the proceedings, with all the original papers and process in the case, and the original appeal bond given by the appellant; and, upon failure to discharge this legal duty, it was competent for the circuit court to issue the necessary process to enforce its performance. *Robinson* v. *Mhoon,* 68 Miss., 712 (9 South., 887). While the writ issued by the circuit court is in the record denominated a "writ of *certiorari,*" it was not issued in pursuance of Code 1892, § 89. Consequently it was not necessary to require the bond mentioned therein. This was not an effort to remove a case to the circuit court by *certiorari,* but was a writ to compel a derelict officer to discharge a duty imposed upon him by an express statutory mandate in reference to a case already duly appealed. And the writ was so considered and dealt with after the original papers were returned in obedience thereto. In passing upon cases brought before the circuit court by virtue of the provisions of sec. 89, the court is confined to an examination of questions of law arising and appearing on the face of the record and proceedings; but in the case at bar this course was not followed, but the case was docketed and tried *de novo,* under Code 1892, § 85. This procedure was correct. Gamble was entitled to have the merits of his case passed upon by the circuit court, and the method adopted by the learned trial judge

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is that indicated and commended by this court in *Robinson* v. *Mhoon, supra.* It is the duty of the circuit court, upon proper showing, to see that the rights of litigants are not impaired on account of any unwarranted action by justices of the peace, and in the instant case this was done, and properly so.

Upon the merits, the granting of the peremptory instruction was manifestly correct, even upon the testimony of the appellant himself. Conceding that he had any legal contract with the tenant who left his premises, the record fails to show that he suffered any definite damage by reason of such leaving, or that the appellee had any knowledge of the existence of any contract between appellant and the tenant, if any such existed, or that appellee at any time either willfully interfered with or knowingly employed the tenant.

We see no error in the record.

Affirmed.

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SAUL T. WOODSON *v.* JEREMIAH R. HOPKINS.

EQUITY. *Jurisdiction. Fraudulent conduct. Illegal contracts.*

A lender of money at extortionate rates of interest, under contracts which are void as against public policy, who establishes an agency for the carrying on of his nefarious business, cannot maintain a suit in equity against one who was placed by him in charge of such business for an accounting where he must call in the aid, directly or indirectly, of the illegal contracts to make out his case. *Gilliam* v. *Brown*, 43 Miss., 641, overruled.

FROM the chancery court of Warren county.

HON. WILLIAM P. S. VENTRESS, Chancellor.

Hopkins, appellant, was complainant, and Woodson, appellee, defendant in the court below. From a decree in complainant's favor the defendant appealed to the supreme court. The facts are fully stated in the opinion of the court.

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McLaurin & Thames, and *McLaurin, Armistead & Brien,* for appellant.

Appellant's contention in this case is that the bill seeks to sustain appellee in carrying on an illegal business against the laws and public policy of the state, and that, this being true, he has no standing in equity under the rule, that he does not come into equity with clean hands. This proposition relates entirely to the right of the plaintiff to maintain this suit without reference to any acts of the defendant at all, and our first inquiry in this case is, What is the attitude of Hopkins, appellee, complainant in the court below, and whether or not he has any standing before this court, and will this court entertain or inquire into the acts of the defendant at all? If it be true that appellee, complainant in the court below, is undertaking to seek the aid of a court of equity to carry on an illegal business contrary to the laws and public policy of the state of Mississippi, on this fact, when once discovered, the court of its own motion would dismiss his bill and deny the relief. The doctrine that every plaintiff must come into a court of equity with clean hands has special reference to the question of conducting an illegal business and the enforcement of illegal contracts. By reference to 1 Pomeroy's Eq. Jur., 438, the court will find the following: "Another very common occasion for invoking the principle (of clean hands) is illegality. Wherever a contract or other transaction is illegal and the parties thereto are in contemplation of law in *pari delicto,* it is a well-settled rule, subject only to a few special exceptions depending on other considerations of policy, that a court of equity will not aid a *particeps criminis* either by enforcing the contract or obligation while it is yet executory, nor by relieving him against it, by setting it aside, nor by enabling him to recover the title and property which he has parted with by this means. The principle is thus applied in the same manner when the illegality is merely *malum prohibitum,* being in con-

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travention to some positive statute, and when it is *malum in se,* and as being contrary to public policy or to good morals."

Hopkins cannot demonstrate to the court that he has any claim whatever against Woodson without resort to the illegal business carried on by him under the name of Shaw & Co., and the authorities are uniform that wherever an illegal business is being conducted, if in the assertion of any right the complaining party is compelled to resort to the illegal business to prove his rights to relief, then all relief will be denied him by the courts. This principle is announced in the leading case of *Gilliam* v. *Brown,* 43 Miss., 641.

The court will bear in mind that this case does not present the question of any executed transactions. There is no allegation in the bill that there are any funds in the hands of Woodson which have come into his hands through executed contracts carried on in such illegal business. On the contrary, the answer denies that there are funds arising from any transactions in carrying on the business of Shaw & Co. in the hands of said Woodson.

On page 660 of the case of *Gilliam* v. *Brown,* the court will find the following language: "The general principle laid down in a great number of cases is to this effect: that if the contract grows out of an illegal act a court of justice will not enforce it, but if the promise be unconnected with the illegal act and is founded on a new consideration, it is not tainted by the act."

"It has been observed that the test whether a demand connected with an illegal act can be enforced is, whether the plaintiff requires any aid from the illegal transaction to establish his case." And on page 661, *et seq.*: "Subjecting the case at bar to this test, it is manifest that the demand of W. T. Brown against his brother's estate must be traced back to the illegal traffic in the cotton, putting the claim in the simplest form of speech, and it takes this legal form." We contend, if the court please, that Hopkins can prove no rights to the court which are entitled to any protection whatever without falling within the test set forth

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in the above quotation, which is by having a resort to the illegal business of Shaw & Co. In other words, he can predicate no rights arising out of the business of Shaw & Co. which would not involve the question of the manner of conducting the business of Shaw & Co., and that would bring to the knowledge of the court the fact that said business is carried on in violation of law, and therefore the court would at once decline to enforce any contracts or any rights, legal or equitable, growing out of such illegal business. Said Hopkins could not show the business relations existing between him and Woodson in reference to the business of Shaw & Co. without it becoming at once pertinent to inquire what kind of a business was that of Shaw & Co., in order to determine the status and rights of the respective parties, and when this is done the court necessarily becomes aware of the fact that the business of Shaw & Co. is illegal, and the doctrine of hands off at once applies. Replevin was instituted for all tangible property, as shown by the original bill.

On page 664 of the same opinion of *Gilliam* v. *Brown*, the court says: "So long as an illegal contract is *in fieri* in the course of execution, neither party can have a remedy grounded upon it, either for its enforcement or for damages for any breach of it," citing authorities. The court goes on in that opinion, and holds that where the contract has been executed, and one party is in possession of all the gain, then such party will not be heard to plead the illegality of such contract against a division of the gains, because, says the court, all the harm that can enure to the public by an infraction of the law has already accrued. But in this case this point does not arise, and it is not claimed in the bill that the defendant, Woodson, is in possession of any gains arising out of the conduct of the illegal business, but that he is claiming said business as his own, and undertaking to carry it on without reporting the conduct of it to the said Hopkins. It can make no difference that this suit is one in chancery, for, says the court in the same case above mentioned,

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"This can make no difference, for a court of equity will no more lend its aid to an iniquitous transaction than a court of law."

In the case of *McWilliams* v. *Phillips,* 51 Miss., 196, the court held, as stated in the syllabus, "Where all the parties participate in the violation of law, the court will not, where the contract is executed, interfere for the relief of either party, but will leave them in their respective conditions. Where the contract is executory, the court will likewise refrain from lending its aid to carry it into effect." On this same point will be found the case of *Wooten* v. *Miller,* 7 Smed. & M., 380.

W. J. Voller, and *Catchings & Catchings,* for appellee.

It is contended that even admitting that Hopkins could recover his property in a court of law, notwithstanding the alleged illegality of the business, a court of equity will not grant him any relief upon the maxim that "he who comes into equity must come with clean hands."

The article of the Am. & Eng. Ency. Law on illegal contracts, from which most of the authorities cited by counsel were obtained, contains an elaborate description of what constitutes illegality in a contract in the sense of that chapter, and it is significant that it is not even suggested that contracts are illegal in that sense because they are usurious.

Illegal contracts cannot be enforced. Contracts evidencing loans of money at usurious interest can be enforced, except as to the interest provided for. Indeed, unless the defendant in a suit on a usurious contract pleads usury, the contract will be enforced as a whole. In the case of an illegal contract, or an immoral contract, the court will itself refuse to grant relief, although the illegality or immorality of the contract be not specially pleaded.

We submit that the very contracts which Woodson made as the agent of Hopkins, calling for usurious interest from the borrowers, were not in themselves illegal in the sense in which the cases cited by counsel used that term. How, then, can it be that

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a contract of employment can be adjudged so illegal as to be unenforceable merely because the employment contemplated the exacting of usurious interest from third persons?

An examination of our statute on the subject of usury demonstrates that it was not intended to make the contract illegal. Section 2348, Code 1892, after defining what shall constitute the legal rate of interest, declares, "And if a greater rate of interest than ten per centum shall be stipulated for or received in any case, all interest shall be forfeited, and may be recovered back, whether the contract be executed or executory."

The only penalty imposed upon the making of usurious contracts is the forfeiture of the interest, and this penalty can only be enforced by the party from whom the usurious interest is exacted. The statute gives no right to any third person to assert any right or maintain any defense upon the ground of usury, and this was the rule at common law.

"It is well settled by a multitude of decisions that the right to plead usury is a privilege personal to the debtor." 27 Am. & Eng. Ency. Law (1st ed.), 949. We submit, however, that if it were true that the contract of employment under which Woodson entered Hopkins' employ were in fact illegal, the situation of the complainant in this suit would be in no wise affected.

Counsel place great reliance upon the following portion of the text of the article on illegal contracts, 15 Am. & Eng. Ency. Law (2d ed.), 1010: "It has been held that if the agent transacts the illegal business without disclosing the fact of his agency, and the money is paid to him in his own right, and not as intermediary or agent, he cannot be ocmpelled to account therefor to his principal, for the reason that the principal could not show his title to the property except through the illegal contract."

Three cases are cited in the note as sustaining this proposition, one of which is *Wooten* v. *Miller,* 7 Smed. & M., 380, which is strongly relied upon by counsel for defendant. We do not concede that this is a correct statement of the law, but submit that even if it be so, it has no application to the facts here

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in controversy. It should be noted that the authority is careful to refrain from suggesting that this principle applies where an agent is dealing as such for an undisclosed principal, the only idea sought to be presented being that where an agent collects money in his own right, and not as agent or intermediary, the principal cannot recover if the fund arose from an illegal business. It is not disputed that all of the property here in controversy was known as the property, not of Woodson, but of Shaw & Co. The business was done under that name, the office rented under that name, the books kept in that name, the money advanced by, and the loans repaid to, Shaw & Co. Woodson's position, therefore, was necessarily that of the representative of Shaw & Co. The testimony shows that Shaw & Co. was Hopkins. It was not illegal to do business under the name of Shaw & Co. Complainant can prove this fact without relying upon any contract, legal or illegal.

While the case of *Wooten* v. *Miller, supra,* is cited as sustaining this proposition, an examination thereof will show that this idea did not enter into the decision of the court in any way whatsoever. The question presented was simply whether or not money paid to an agent by virtue of an illegal contract of employment could be recovered by the principal, and the court held that it could not, although the contract was fully executed. The decision simply places contracts executory and contracts executed upon precisely the same footing, and denies relief to the principal in either case. No distinction is suggested or intimated between money paid to an agent, as such, and paid to an agent in his own right. The case, therefore, is not authority for the proposition to support which it is cited. Indeed, in this state it is not authority upon any point decided, for it has been overruled by the case of *Gilliam* v. *Brown,* 43 Miss., 641, also cited by counsel for defendant. The facts of the two cases were almost identical, while the rulings of the court were diametrically opposed.

In the Wooten case the owner of a slave in North Carolina

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placed him in the possession of one about to move to this state, to be sold or hired by him contrary to the laws of this state. The sale was effected, the contract executed, and the court held that the owner of the slave could not recover from his agent the price for which he was sold.

In the Gilliam case the owner of certain cotton during the civil war put it in possession of his brother to carry it through the lines of the contending forces, and sell it contrary to law. The sale was made, and the contract executed. The court held that, because it was executed, the owner of the cotton could recover the amount for which it was sold. This decision is in many ways directly in point to sustain our contentions, assuming that the contract here in controversy is illegal, as claimed.

WHITFIELD, C. J., delivered the opinion of the court.

The case made by the record is briefly this: That a certain Dr. Hopkins, of Atlanta, Ga., was the owner of a number of loan agencies in various states; a number in Memphis, Tenn., and a number in Vicksburg, Miss. They were conducted under assumed names: Cobb & Company, Shaw & Company, Mathis & Company, etc. Shaw & Company was the assumed name given to the office of Hopkins conducted by S. T. Woodson, as agent, in Vicksburg. The business consisted in loaning money in small sums to necessitous and ignorant people, mostly negroes; and this name of Shaw & Company was taken, evidently, for the purpose of preventing any borrower from suing to recover back usury paid, and was a disguise to hide the real person who had collected the usurious interest. This interest amounted to thirty-five per cent per week. A borrower, for example, would borrow, say, $10, and thirty-five per cent amounted to $3.50, which would be added to the $10 loaned, making $13.50, and this sum of $13.50 would form the consideration of a bill of sale of the borrower's household effects, and was required to be paid in one week. This unconscionable business seems to have resulted in large profits to Hopkins. Woodson claims, and

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proves, by himself and a witness, Chaney, that he made an agreement with Hopkins, when last in Vicksburg, that upon the payment to Hopkins of $2,300 the business of Shaw & Company should become the property of Woodson; and Woodson testified that Hopkins only put in something over $1,000 originally, and that on the 7th of April, 1904, he had drawn out the sum of $2,300, and that by the terms of the agreement he then took the business and property of Shaw & Company, and declined to further account to Hopkins after that date. He also in his answer alleged that there were no executed transactions from which any money arose, and remained in his hands at the time of this suit, that he by law could be required to account to Hopkins for; and Hopkins, of course, wholly denies all the statements with respect to the purchase of the business. This suit was brought by him in the chancery court of Warren county against Woodson to recover moneys alleged to be the result of this business and remaining in Woodson's hands for him. Hopkins had Woodson arrested and imprisoned, and undertook to take charge of the business, and sued out an injunction against Woodson and others, enjoining them from having anything to do with the alleged property of Shaw & Company, and restraining them from collecting any of the amounts of money alleged to be due Shaw & Company, and from using the office in which the business had been transacted. Hopkins afterwards amended his bill, and the prayer of the bill was as follows:

"Complainant therefore prays that, pending this suit, a receiver may be appointed by this honorable court with full authority to take charge of all of the property which was used in and about the business of said Shaw & Company, including all office furniture and fixtures and all of the books and accounts and evidences of indebtedness belonging to or used in connection with the said business of Shaw & Company, and of the office in which said business was conducted, and that the defendants, S. T. Woodson, W. H. Sublett, and A. J. Gebhardt, or either of them who may have the same in his custody, may

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be commanded and directed forthwith to deliver and turn over to the said receiver all property of every sort and description whatsoever pertaining to or growing out of the said business conducted under the name of Shaw & Company, as aforesaid, including all books, accounts, memoranda, route cards, and other evidences, showing what loans were made and to whom made, and what amounts have been paid thereon, and what amounts remain due thereon, and the places of residence of the persons making such loans from said Shaw & Company, and that said receiver be authorized and empowered to take and receive all of said property, and that he be directed to collect, as conveniently as may be, all sums of money which may be due and owing, as having been borrowed and obtained from the said Shaw & Company, and that he retain in his possession, to abide the final determination of this suit, the said office and all sums so collected by him, and all other property of every description which may come into his possession, as having pertained to the business of said Shaw & Company, directly or indirectly, until further order by this court."

Part of this prayer calls for, it will be observed, a direction that the receiver shall collect all sums of money which may be due and owing Shaw & Company, and the turning over to the said receiver of all books, accounts, etc., showing what loans were made, to whom made, what amounts had been paid thereon, what amounts remained due, and the places of residence of the persons making such loans. The final decree is as follows:

"Ordered, adjudged, and decreed that the injunction heretofore issued herein against the said defendants, S. T. Woodson, W. H. Sublett, and A. J. Gebhardt, be, and the same is hereby, made perpetual. It is further ordered, adjudged, and decreed that the said defendants deliver to the complainant herein, within ten days after the date of this decree, all books, memorandums, route cards, accounts, or evidences of indebtedness, and all other property of any and every sort and description which came into their possession, or into the possession of either

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of them, as managers, agents, or employes in and about the business heretofore etablished in the city of Vicksburg, Mississippi, by the complainant under the name and style of Shaw & Company, and that they also pay over to the complainant all moneys which may have been collected by them growing out of the management and control by them of the business so conducted under the name of Shaw & Company."

The answer sets up the defense that the contract between Hopkins and Woodson, and these usury contracts—so extortionate as to shock the moral sense upon mere statement—were illegal and violated the public policy of this state, and that the bill, consequently, should not be maintained, but that the court of conscience, on well-settled principles, would leave these plunderers where it found them. Undoubtedly, the usury contracts, to the extent of the usury, were illegal and against public policy. 15 Am. & Eng. Ency. of Law, 939e. But aside from this feature, we hold, without hesitation, that no such robbing contracts as this record discloses can be other than against the public policy of the state, on account of their extortionate character. In 15 Am. & Eng. Ency. of Law, p. 933, par. 4, subd. 2, it is said: "While the chief sources for determining the public policy of a nation are its constitution, laws, and judicial decisions, still, however, these are not the sole *criteria*, and the courts should not hesitate to declare a contract illegal merely because no statute or precedent prohibiting it can be found."

We approve this as sound doctrine strictly applicable to the case made by this record. The true doctrine as to the inability of either party to a contract against public policy being permitted to invoke the aid of a court of law or equity is thus stated in the same authority (pages 998, 999, 1001): "Where illegal contracts are executed by the parties, then the same principle of public policy which leads courts to refuse to act when called upon to enforce them will prevent the court from acting to relieve either party from the consequence of the illegal transactions. In such cases the defense of illegality prevails, not as a

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protection to the defendant, but as a disability in the plaintiff. The court does not give effect to the contract, but merely refuses its aid to undo what the parties have already done." "The fact that the party seeking to enforce executory provisions of an illegal contract, though they consist only of promises to pay money, has performed the contract on his part, and that, unless the other party is compelled to perform, he will derive a benefit therefrom, will not induce the court to enforce such provisions. Nor can the party performing, on his part, the provisions of an illegal contract, recover on the ground of an implied promise on the part of the party receiving the benefits therefrom to pay therefor, as the law will imply no promise to pay for benefits received under an illegal contract by reason of the performance thereof by the other party."

The same doctrine is admirably stated in 9 Cyc. of Law, 546: "No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim. The rule is expressed in the maxim, '*Ex dolo malo non oritur actio*,' and in '*In pari delicto potior est conditio defendentis*.' The law, in short, will not aid either party to an illegal agreement; it leaves the parties where it finds them. Therefore neither a court of law nor a court of equity will aid the one in enforcing it, or give damages for a breach of it, or set it aside at the suit of the other, or, when the agreement has been executed, in whole or in part, by the payment of money or the transfer of other property, lend its aid to recover it back. The object of the rule refusing relief to either party to an illegal contract, where the contract is executed, is not to give validity to the transaction, but to deprive the parties of all right to have either enforcement of, or relief from, the illegal agreement. While it may not always seem an honorable thing to do, yet a party to an illegal agreement is permitted to set up the illegality as a defense, even though it may be alleging

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his own turpitude. Money paid under an agreement which is executed, whether as the consideration or in performance of the promise, cannot be recovered back where the parties are in *pari delicto*. And goods delivered or lands conveyed under an illegal agreement are subject to the same rule. Courts will not, even with the consent of the parties, enforce an illegal contract. And it would seem to follow that an illegal agreement cannot be rendered legal by ratification. An agreement void as against public policy cannot be rendered valid by invoking the doctrine of estoppel."

The distinction has been sought to be drawn, but only in some few cases, to the effect that, if a contract has been executed and one of the parties has the avails, all the harm that can be done to public policy has been done, and the party having the avails can be compelled to pay over the whole of them, or a proportionate share of them, to the other party. In 15 Am. & Eng. Ency. Law, 1011, it is stated as to partnership, "In some cases, however, the proposition has been advanced that, if the illegal purpose of the partnership has been accomplished, the courts may direct a division of the proceeds;" but the text repudiates this as unsound. *Gilliam* v. *Brown,* 43 Miss., 641, is one of the cases holding this repudiated view. The Cyclopedia of Law states the same doctrine as the American & English Encyclopedia of Law on this subject, noting, however, that there are "a number of decisions" holding like *Gilliam* v. *Brown,* but that is not the true view, saying, at page 559: "Theoretically, it is said by a recent writer, there is a distinction between enforcing an illegal contract and enforcing a duty not springing from the contract, but arising solely from the receipt of the money or goods. But practically it is impossible to reconcile the actual decisions on this point. A number of courts have refused to allow a recovery by a principal or partner in an illegal enterprise, on the ground that to do so would be to enforce, or at least to recognize, the illegal agreement"—and in a note appends a masterly statement of the true doctrine by

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Jessel, M. R., in *Sykes* v. *Beadon*, 11 Ch. Div., 170: "The notion that because a transaction which is illegal is closed, therefore a court of equity is to interfere in dividing the proceeds of the illegal transaction, is not only opposed to principle, but to authority—to authority in the well-known case of the highwaymen, where a robbery had been committed, and one highwayman unsuccessfully sued the other for the division of the proceeds of the robbery. So in the case he puts of one of two partners engaged in merchant trade. As I read it, he meant the trade of smuggling goods. If two persons go partners as smugglers, can one maintain a bill against the other to have an account of the smuggling transaction? I should say, certainly not. It is not sufficient to say that the transaction is concluded, as a reason for the interference of the court. If that were the reason, it would be lending the aid of the court to assert the rights of the parties in carrying out and completing an illegal contract. If the partnership is for the purpose of smuggling, that is an illegal contract, and the court cannot maintain it, and the court will not lend its aid at all to it. That reasoning, then, of Lord Cottenham is not sufficient, and I should have answered the question not, as Lord Cottenham does, in the affirmative, but in the negative. I do not say that this observation at all affects the authority of *Sharp* v. *Taylor* as it stands, but I think it does affect very much the *dicta* which I have read from the judgment, and that is the reason I have read them. It is no part of the duty of a court of justice to aid either in carrying out an illegal contract or in dividing the proceeds arising from an illegal contract between the parties to that illegal contract. In my opinion no action can be maintained for the one purpose more than for the other."

The doctrine thus stated by that great jurist is also put unanswerably in *Hoffman* v. *McMullen*, 83 Fed., 372 (28 C. C. A., 178; 45 L. R. A., 410). See also 11 Cent. Dig., sec. 693, and authorities; *Myers* v. *Meinrath*, 101 Mass., 366 (3 Am. St. Rep., 368); *Edwards* v. *Randle* (Ark.), 38 S. W., 343 (36

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L. R. A., 174; 58 Am. St. Rep., 108); *Kahn* v. *Walton*, 46 Ohio St., 195 (20 N. E., 203).

The test in all such cases is correctly stated in 15 Am. & Eng. Ency. of Law, 934, as follows: "Where a contract belongs to a class which is reprobated by public policy, it will be declared illegal, though in that particular instance no actual injury may have resulted to the public, as the test is the evil tendency of the contract, and not its actual result."

This demonstrates the utter fallacy of the statement in *Gilliam* v. *Brown*, *supra*, that, where such a contract has been executed, the courts will entertain a suit, because "all the harm that can be done to public policy has already been done." This is a gross misconception of the spirit of the rule. The courts leave violators of the law, as they ought to be left, in the condition where they find them. They are repelled by the courts because of the great supervening principle of public policy involved, without reference to the attitude which one of the parties may occupy to the other, where both are in *pari delicto*. As pungently put in *Hoffman* v. *McMullen*, *supra:* "Courts are not organized to enforce the saying that 'there is honor among wrongdoers,' and the desire to punish the man that fails to observe this rule must not lead the court to a decision that such persons are entitled to the aid of courts to adjust their differences arising out of, and requiring an investigation of, their illegal transactions."

The true doctrine was correctly put long ago in *Wooten* v. *Miller*, 7 Smed. & M., 386, the court saying: "We have nothing to say in behalf of the morality of the transaction nor in favor of those who make the defense; but as they interpose the law as a shield, we cannot do less than say it covers and protects them." And again in *Deans* v. *McLendon*, 30 Miss., 343, where the court said: "Courts of justice, in the observance of these rules, are not influenced by any considerations of respect or tenderness for the party who insists upon the illegality of a contract, but exclusively by reasons of public policy. The object

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is to punish the active agent in the violation of a law by withholding from him the anticipated fruits of his illegal act, and thus, by deterring all persons from violating its mandates, to give sanctity to the law and security to the public." And in *McWilliams* v. *Phillips,* 51 Miss., 196, where the court say: "If both, however, concur in the illegal act and are in equal fault, the modern doctrine is that a court will not entertain the claim of either against the other to carry into effect the illegal contract." And in *Williams* v. *Simpson,* 70 Miss., 115 (11 South., 689). We call special attention to the fact that in every one of these four Mississippi cases the contract was an executed one, the last one being the case of a merchant who merely failed to pay a sufficient privilege tax, and the one in 51 Miss., a case where a liquor dealer had simply failed to pay the required tax—cases where the acts were merely *mala prohibita.* The extraordinary circumstance about the case in 51 Miss. is that the opinion was delivered by the same judge who delivered the opinion in *Gilliam* v. *Brown,* in 43 Miss. In the case in 51 Miss., 197, the retail liquor dealer's case, Judge Simrall, speaking for a unanimous court, said: "All the parties participating in the violation of the law are in *pari delicto.* In such cases the courts will not, where the contract has been executed, interfere for the relief of either party, but will leave them in their respective conditions. Where a contract is executory, they will likewise refrain from lending aid to carry it into effect." And, a few lines below, Judge Simrall says that this doctrine, where the contract has been executed, as well as where it is executory, is the modern doctrine. We quite agree with this last statement, and the marvel is that whilst the case in 51 Miss. thus squarely overrules *Gilliam* v. *Brown,* eight volumes before, in 43 Miss., no allusion is made to the overruled case. It will thus be seen that in the four Mississippi cases cited above in 7 Smed. & M., in 30 Miss., in 51 Miss., and in 70 Miss. (11 South.), the doctrine—the true modern doctrine—is declared to be in accordance with the excerpts we have made

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from the American & English Encyclopedia of Law and the Cyclopedia of Law, supported by innumerable citations, that neither a court of law nor a court of equity will entertain a suit by either party to an illegal contract against the other, where the contract is one against public policy, whether executed or executory.

It is true that in the case of *Howe* v. *Jolly*, 68 Miss., 323 (8 South., 513), and in the case of *Andrews* v. *N. O. Brewing Co.*, 74 Miss., 362 (20 South., 837; 60 Am. St. Rep., 509), the court followed *Gilliam* v. *Brown*, 43 Miss., 641; but it is also true that those cases limped along after that case, without the citation of a single authority and without a single line of reasoning, when, if the court had simply examined the four cases referred to in our reports, and especially the case in 51 Miss., it would have seen that *Gilliam* v. *Brown* had been overruled, and the doctrine of 7 Smed. & M. and 30 Miss. reinstated as to executed contracts; and it would have also noted the pregnant fact that the judge who wrote the opinion in 43 Miss. apologized for it in 51 Miss. by saying that the view established in Mississippi before the case of *Gilliam* v. *Brown*, reinstated and thoroughly approved in the cases we have referred to in 51 Miss., 196, and 70 Miss., 113 (11 South., 689), was the "true modern doctrine." *Gilliam* v. *Brown* having thus manifestly been overruled by these two last-named cases, the two cases in 68 Miss. (8 South.) and 74 Miss. (20 South., 60 Am. St. Rep.), having inadvertently followed an overruled case, we declare the law in Mississippi now to be as it was stated to be in the four cases: *Hoover* v. *Pierce*, 26 Miss., 627; 30 Miss., 343; 51 Miss., 196; and 70 Miss., 113 (11 South., 689)—viz.: That neither a court of law nor a court of equity, in this state, will entertain a suit for relief by either of two parties in *pari delicto* against the other, where the contract is against public policy. The plain truth is, on principle, that the contrary doctrine holds out a premium to those who violate the law, since, according to that doctrine, if they can only hurry fast enough

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to consummate their villainy, the law will help one to get from the other his part of the stolen plunder. In further demonstration of the inaccuracy of the opinion in *Gilliam* v. *Brown* we call attention to two other misstatements of the law therein contained. It is said at page 660 of that opinion: "A bond or deed made for a past cohabitation is good." The American & English Encyclopedia of Law, Vol. 15, p. 961, says: "This obligation on the part of the man, however, cannot rise above a moral obligation on his part; and as a moral obligation is, as a rule, insufficient to support a contract, it is therefore held by the weight of authority that past cohabitation alone is not sufficient consideration for a promise, not under seal, by the man to remunerate the woman."

The other misconception is in confusing the case of a suit by one of two parties to an illegal contract against the other with a suit by one of the parties against a third party, no way connected with the illegal contract, to collect money paid by the other party to the illegal contract, which has been executed, to such third person for the use of the party suing. This principle is clearly stated at p. 1007, Vol. 15, Am. & Eng. Ency. Law, par. 9, and it is stated there, with great exactitude of statement, that the reason that the third person cannot defend an action by the latter is "that in such a case the action is not based on the illegal contract, but, instead, upon the independent contract of such third person to deliver over the property received by him."

The same principle is also clearly stated in 9 Cyc. of Law, 563. In all such cases the case is made out quite independently of any reference to the illegal contract; the suit is on a new promise based upon a new consideration. A striking statement of the principle is found in note 96, p. 560, of the latter authority, where it is said: "The status of such a case has been well put thus: Two men enter into a conspiracy to rob on the highway, and they do rob, and while one is holding the traveler the other rifles his pockets of $1,000, and then refuses to divide,

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and the other files a bill to settle up the partnership, when they go into all the wicked details of the conspiracy and the rencounter and treachery. Will a court of justice hear them? No case can be found where a court has allowed itself to be so abused. Now, if these robbers had taken the $1,000 and invested it in some legitimate business as partners, and had afterwards sought the aid of the court to settle up that legitimate business, the court would not have gone back to inquire how they first got the money; that would have been a past transaction, not necessary to be mentioned in the settlement of the new business."

In the unanswerable opinion of Hawley, district judge of the United States circuit court of appeals, *Hoffman* v. *McMullen,* 83 Fed., 384 (28 C. C. A., 190; 45 L. R. A., 418), the doctrine is thus stated: "In support of these views, the court quotes *in extenso* from *Sharp* v. *Taylor,* 2 Phill. Ch., 801, 817, which closed the statement that 'the difference between enforcing illegal contracts and asserting title to money which has arisen from them is distinctly taken in *Tenant* v. *Elliott* and *Farmer* v. *Russel,* and recognized and approved by Sir William Grant in *Thomson* v. *Thomson,*' thus clearly indicating the class of cases to which the case then under consideration belongs. The distinction between the cases where a recovery can be had, and the cases where a recovery cannot be had, of money connected with an illegal transaction, to be gleaned from all the authorities, is substantially this: That wherever the party seeking to recover is obliged to make out his case by showing the illegal contract or transaction, or through the medium of the illegal contract or transaction, or when it appears that he was privy to the original illegal contract or transaction, then he is not entitled to recover any advance made by him in connection with that contract, or money due him as profits derived from the contract; but that when the advances have been made upon a new contract remotely connected with the original illegal contract or transaction, and the title or right of the party to recover is not

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dependent upon that contract, and his case may be proved without reference to it, then he is entitled to recover."

The distinction between the class of cases is clearly set forth in *Thomson* v. *Thomson,* 7 Ves. Jr., 470. The master of the rolls, after declaring that the agreement there under consideration was illegal, said: "There is an equity against the fund, I admit, if you can get it by a legal agreement. The defense is very dishonest, but in all illegal contracts it is against good faith, as between the individuals, to take advantage of that. A man procures smuggled goods and keeps them, but refuses to pay for them. So, in the underwriter's case, an insurance contrary to the act of parliament, the brokers had received the money and refused to pay it over, and it could not be recovered. No matter who complains of it, the thing is illegal. You have no claim to this money except through the medium of an illegal agreement, which, according to the determinations, you cannot support. I should have no difficulty in following the fund, provided you could recover against the party himself. If the case could have been brought to this, that the company had paid this into the hands of a third person for the use of the plaintiff, he might have recovered from that third person, who could not have set up this objection as a reason for not performing his trust. *Tenant* v. *Elliott* is, I think, an authority for that. But in this instance it is paid to the party, for there can be no difference as to the payment to his agent. Then how are you to get at it except through this agreement? There is nothing collateral in respect of which, the agreement being out of the question, a collateral demand arises, as in the case of stock-jobbing differences. Here you cannot stir a step but through that illegal agreement, and it is impossible for the court to enforce it."

As remarked in this last citation, in the case at bar, as in the case of *Thomson* v. *Thomson,* the payment to Woodson, the agent, was payment to Hopkins.

The third mistake in the opinion of *Gilliam* v. *Brown* is the

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statement that one partner in the case of an executed contract, with the avails of an illegal contract in his hands, may be made to account to the other partner for his proportionate part. In 15 Am. & Eng. Ency. Law, par. 10, p. 1008, it is said: "Where several persons as co-parties enter into an illegal contract, which is executed, and one of such co-parties receives the profits of the contract or fund raised by such contract, it has been held that the courts will not compel him to account to the other co-parties for their share of such profits, as their right to share therein is undoubtedly based upon the illegal contract, and permitting the recovery of their shares would be an enforcement of a part of such contract." And at p. 1011, par. 2, the same doctrine is announced.

We may also observe, in passing, that in Am. & Eng. Ency. Law, 1010, note 3, *Wooten* v. *Miller,* 7 Smed. & M., 380, is cited as holding: "That if an agent transacts the illegal business without dsclosing the fact of his agency, and the money is paid to him in his own right, and not as an intermediary or agent, he cannot be compelled to account therefor to his principal, for the reason that the principal could not show his title to the property except through the illegal contract."

And the principle is universal that one party to an illegal contract can have no accounting from the other, where he must call in the aid, directly or indirectly, of the illegal contract to make out his case. It is curious to note in 15 Am. & Eng. Ency. Law, 1012, that some courts have held that "where the illegal business transacted by the partnership results in losses, and one of the partners has advanced more than his proportion, he cannot force the other partners to reimburse him." This strengthens the position that partners, no more than others, can enforce contracts against public policy, executory or executed. This last statement of the principle as to recovery of losses is the mere complement of the other as to the recovery of profits.

A careful reading of the pleadings and the record, the evidence and the decree, in this case, makes it plain that this suit

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cannot be maintained, except by the use and through the aid of the illegal contract itself, and that, in effect, a decree of affirmance would be a decree assisting in the carrying forward of this unconscionable and illegal scheme.

Reversed and bill dismissed.

SUGGESTION OF ERROR.

After the rendition of the foregoing opinion, *Catchings & Catchings,* and *W. J. Voller,* for appellee, filed the following suggestion of error:

"We respectfully suggest that the court erred in reversing the decree of the chancery court in this case. First—The record in this case does not disclose any contract whatever which is illegal in the sense in which this term is used by text writers or in such degree as to render it void as against public policy. Second—If the record discloses a contract illegal, and therefore void as against public policy, the rights asserted and relief prayed for by the complainant in the court below (appellee here) are not based upon, and do not arise under, said contract, but are wholly collateral thereto and independent thereof.

"First—The record shows that appellee entered into a contract with appellant by which the latter was employed to lend money to various persons, and to collect, account for, and pay over the proceeds to appellee. The court's opinion is to the effect not only that the contracts of loan which appellant made to the customers of the concern were illegal and void because usurious, but that the illegality of these contracts must be imputed back to the contract of employment by virtue of which appellant got possession of appellee's funds, and, being so imputed back, so infect this contract as to render it also illegal and utterly void. We submit that this is not the law, and cannot be, in this state. We contend that the contracts of loans were themselves not illegal and void under the laws of this state. The court, in support of its conclusion that the contracts are

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illegal and void, cites 15 Am. & Eng. Ency. Law, p. 933, par. 4, subd. 2, as follows: 'While the chief sources for determining the public policy of a nation are its constitution, laws, and judicial decisions, still, however, these are not the sole *criteria*, and the courts should not hesitate to declare a contract illegal merely because no statute or precedent prohibiting it can be found.' We concede that, if the statute did not in itself undertake to declare just what should be the effect of usurious contracts, it might perhaps be in the discretion of the courts to adjudge them void as against public policy. But inasmuch as our statute on the subject of usury not only does not prohibit the making of usurious contracts, nor declare them void, but, in express terms, fixes and defines the consequences and penalties which shall follow the making of such contracts, as the forfeiture of the interest, we insist that it is not within the powers of the court to decree a different and higher penalty. Our view is borne out by the very authority cited. 15 Am. & Eng. Ency. Law, p. 941, par. 5, subd. 'h.' Among the cases cited is that of *Oats* v. *National Bank,* 100 U. S., 249 (25 L. ed., 580), in which it was sought to have the court declare a usurious contract void. There are also cited *Lazear* v. *National Bank,* 52 Md., 78 (36 Am. St. Rep., 355); *First Nat. Bank* v. *Childs,* 133 Mass., 248 (43 Am. St. Rep., 509); *Pratt* v. *Short,* 79 N. Y., 437 (35 Am. St. Rep., 531); *Columbus Bank* v. *Garlinghouse,* 22 Ohio St., 492 (10 Am. St. Rep., 751)—in all of which the same attempt was made to have usurious contracts declared void, and in all of which the courts held that it was beyond their power to add other penalties or give different effect to the contracts than those fixed by the statutes. See also *Harding* v. *Am. Glucose Co. et al.,* 182 Ill., 551 (55 N. E., 577; 64 L. R. A., 738; 74 Am. St. Rep., 189). Appellee could have recovered from the persons to whom the loans were made the principal loaned, yet, under the opinion of the court, he is not permitted to recover from his agent who made the loans the very principal which he could have recovered from the persons from

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whom the usurious interest was extorted. Not only this; he is not permitted to reclaim the very books of account and office furniture which under the finding of fact of the lower court belonged to him, because they were used by his agent in connection with the business of loaning money at usurious rates of interest. In other words, appellee is subjected to a complete forfeiture not only of his principal and interest, but of all his other property used in connection with the business, merely because usury was exacted. And this not at the instance of the borrowers, whom alone the usury statutes are intended to protect, but upon the plea of a third person, with whose welfare the statutes have no concern. In 29 Am. & Eng. Ency. Law, p. 532, it is said: 'The defense of usury is not a defense favored by the courts, either of law or equity.' Again, p. 534, same volume: 'The defense of usury is personal to the debtor and his privies, and cannot, as a general rule, be set up by a stranger, as the object of the usury statutes is the protection of the borrowers, who may waive their benefits.' This court has held that under certain circumstances a person may be estopped from setting up usury as a defense. *Henderson* v. *Hartman,* 65 Miss., 466 (4 South., 549). See also 15 Am. & Eng. Ency. Law, p. 1014. It may be that appellee in this case was engaged in a business 'so extortionate as to shock the moral sense upon mere statement,' but the court should not permit itself to be led by this fact into the imposition of a different penalty than that provided by the statute. Under the statute, no greater penalty can be imposed for the charge of 1,000 per cent interest than for the charging of 11 per cent interest, and the consequence which follows the habitual violation of the statute against usury is precisely the same as that which results from the first offense.

"Second—If we are wrong in our contention that the record discloses no illegal contract, we submit that the rights of appellee are not founded upon such illegal contract. In this case it was not necessary to prove any contract, it being sufficient to

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show the ownership of the property in complainant. So far as we know, the authorities are entirely harmonious to the effect that, where an illegal contract is merely collaterally connected with or incidentally involved in a transaction, the courts will not withhold their relief. The court cites the general statement of law relating to illegal contracts contained in 9 Cyc. Law, p. 456, overlooking, it seems, the fact that certain exceptions are there stated. One of the exceptions is found on p. 557 under the heading: 'g. Persons in Possession of Profits of Illegal Transactions.' We respectfully submit that the citation from 15 Am. & Eng. Ency. Law, p. 1011, is not applicable. That portion of the text relates solely to accounting between partners. The court, in its opinion, says that the case of *Howe* v. *Jolly*, 68 Miss., 323 (8 South., 513), and *Andrews* v. *N. O. Brewing Co.*, 74 Miss., 362 (20 South., 837; 60 Am. St. Rep., 509), limped along after *Gilliam* v. *Brown*, 43 Miss., 641, without the citation of a single authority; having inadvertently overlooked the fact that *Gilliam* v. *Brown* had been overruled in *McWilliams* v. *Phillips*, 51 Miss., 196. We wish to call the attention of the court to the fact that *Gilliam* v. *Brown* was in terms reaffirmed in the case of *Walker* v. *Jeffries*, 45 Miss., 165, and *Gary-Hudson & Co.* v. *Jacobson*, 55 Miss., 207 (30 Am. St. Rep., 514). It was also cited with approval in the very late case of *Fewell* v. *Surety Co.*, 80 Miss., 791 (28 South., 755; 92 Am. St. Rep., 625), and *Knut* v. *Nutt*, 83 Miss., 365 (35 South., 686). There can be no question that the effect of the opinion of the court in this case is not only to overrule the case of *Gilliam* v. *Brown*, in 43 Miss., but the cases in 45 Miss., 55 Miss., 68 Miss., 80 Miss., and 83 Miss., which affirmed it."

RESPONSE TO SUGGESTION OF ERROR.

WHITFIELD, C. J., delivered the response of the court to the suggestion of error.

It is said in the suggestion of error that our opinion "is to the effect not only that the contracts of loan which appellant

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made with the customers of the concern were illegal and void because usurious, but that the illegality of these contracts must be imputed back to the contract of employment by virtue of which appellant got possession of appellee's funds, and, being so imputed back, so infect this contract of employment as to render it also illegal and utterly void." Learned counsel misconceive. We did not declare these contracts—either the one between Woodson and Hopkins, or those between Woodson, as agent for Hopkins, and borrowers — unenforceable because merely usurious. We expressly said that they were so declared because they were unconscionable, so highly extortionate as to shock the conscience upon the mere statement of them; and we referred to 15 Am. & Eng. Ency. Law, p. 933, par. 4, subd. 2, for authority. We said nothing at all about the mere usurious nature of the contract, except that, to the extent of usury, it was, of course, illegal. Again, it is said Hopkins "is not permitted to reclaim the very books of account and office furniture, but is subjected to a complete forfeiture," etc., and "that this penalty is imposed upon him at the instance, not of the borrowers, whom alone the usury statutes were intended to protect, but upon the plea of a third person, with whose welfare the statutes on the subject of usury have no concern." There is no question of forfeiture in the case. It is a case of inability to sue. Hopkins has placed himself in a position where he cannot call upon a court of conscience to enforce his demands, because they are against public policy, by reason of their iniquitous and extortionate character; and this penalty, if it be a penalty, is self-inflicted, and his contracts are declared unenforceable in any court in this state not because they are usurious, but because they are so utterly oppressive and extortionate as that no court should enforce them. It is said again in the suggestion of error "that, if it be true that this business was so extortionate as to shock the moral sense upon mere statement, the court should not therefore permit itself to be led by this fact into the imposition of a different penalty than that provided by the statute; that under the

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statute no greater penalty can be imposed for the charging of 1,000 per cent interest than for the charging of 11 per cent interest." This discloses a failure on the part of counsel to apprehend accurately the exact ground on which the opinion proceeded, and, indeed, this misconception pervades the entire suggestion of error. The mistake learned counsel make is in not distinguishing between a contract merely usurious, and a contract, like this one, which not only provides a rate of interest so outrageous that the mere usury feature is lost in the grossness of its general iniquity, but also provides bills of sale on all household effects, kitchen furniture, etc., of neccessitous borrowers, under which property worth, it might be, a hundred times the loan, may be confiscated in a week's time. It is not a case of ordinary usury, but a case of extraordinary wrong and oppression. Again, counsel say: "Under the statute, no greater penalty can be imposed for the charging of 1,000 per cent interest than for the charging of 11 per cent interest." Most true, "under the statute." But we are not dealing with this case under a usury statute, merely. We are dealing with this case as what it clearly is—to wit, a case in which the usury statute is a mere guise, under cover of which the helpless and defenseless may be robbed by contracts unenforceable because against public policy, not for that they are usurious, but for that they result in gross wrong and oppression of the weak and defenseless, whom courts were established to protect.

Learned counsel do not so much urge that the case (*McWilliams* v. *Phillips*) in 51 Miss., 196, does not overrule *Gilliam* v. *Brown,* in 43 Miss., 641, for they style the opinion in 51 Miss., "inconclusive and contradictory," as that *Gilliam* v. *Brown* has been followed in the other cases to which we referred as limping lamely after *Gilliam* v. *Brown,* and also in three other cases referred to by them: *Walker* v. *Jeffries,* 45 Miss., 160; *Gary* v. *Jacobson,* 55 Miss., 207 (30 Am. St. Rep., 514); *Knut* v. *Nutt,* 83 Miss., 365 (35 South., 686). As to the first case (45 Miss., 160), the opinion was delivered by Tarbell, J., and merely fol-

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lowed *Gilliam* v. *Brown,* prior to the case in 51 Miss., which overruled it. As to the second of the above cases (*Gary* v. *Jacobson*), that was a case of fraudulent conveyance assailed by creditors, and wholly out of point in this discussion. The court pointed this out at p. 207, 55 Miss. (30 Am. St. Rep., 514), saying: "There is a manifest distinction between conveyances in fraud of creditors, and offenses against the penal law. By one the body politic, the sovereign commonwealth, is wronged; by the other, those only who have an interest in undoing the fraud, and this number is limited in our state to pre-existing creditors." And the case at bar is of the class named as being against public policy. In the third case (*Knut* v. *Nutt*), after deciding the case on the right ground, it is true the case of *Gilliam* v. *Brown* was cited, but that case (*Knut* v. *Nutt*) went off on a ground wholly independent of the doctrine of *Gilliam* v. *Brown*. That ground was this: That in order to disconnect the government from quarrels between claimants and their attorneys, growing out of the transfers or assignments of claims, or interests therein, and powers of attorney for receiving payment of the same, sec. 3477, Rev. St. U. S. (U. S. Comp. St. 1901, p. 2320), provided that all such transfers, etc., should be void unless made after the allowance of such claims. In the Knut case the government had paid the money, and had nothing to do with the contest between counsel and his client, subsequently arising. The purpose of the government, as stated expressly in the Knut case, was to provide by this section (sec. 3477) for ridding itself of all inconveniences arising out of claims transferred before it had paid the money. It resulted from the statute that the government and its department officers ceased to be involved in injunction and other embarrassing legal procedure, and established for itself, as stated in the Knut case, an easy system of bookkeeping between itself and the claimants direct. The claim having been allowed, and the amount paid by the government, its books were closed, and it had nothing to do

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with subsequent troubles between counsel and client; and this is our holding in the Knut case, and it is perfectly obvious that the doctrine of *Gilliam* v. *Brown* had nothing to do with that holding.

Suggestion of error overruled.

CHARLES FULLER *v.* STATE OF MISSISSIPPI.

1. **CRIMINAL LAW.** *Charge to grand jury. Code* 1892, § 2373. *Unlawful sale of intoxicants. Indictment. Quashal.*

   Although the statute, Code 1892, § 2373, requires the circuit judge to charge the grand jury touching its duty, and requires him especially to give in charge the statute against the unlawful sale of intoxicants, it is improper for the judge, directly or indirectly, to designate a particular individual as making such sales. If he does so, and the individual be indicted for the crime, the indictment, on seasonable motion, will be quashed.

2. **SAME.** *Judicial indiscretion.*

   A conviction for the unlawful sale of intoxicants will be reversed if, on overruling defendant's application for a continuance, the trial judge, in the presence of jurors, announce that there has been much complaint about the failure to convict "these criminals," and that the court feared it was largely due to continuances.

FROM the circuit court of, first district, Hinds county.

HON. DAVID M. MILLER, Judge.

Fuller, the appellant, was indicted, tried, and convicted of the unlawful sale of intoxicants, and appealed to the supreme court. The facts upon which the decision turned are well stated in the opinion of the court.

Thompson & Stricker, for appellant.

The motion to quash the indictment in this case should have been sustained because of the improper remarks made by the

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trial judge in his charge to the grand jury which found the indictment. *Welch* v. *State,* 68 Miss., 341; *Wilson* v. *State,* 70 Miss., 595; *Blau* v. *State,* 82 Miss., 514.

In *Wilson* v. *State, supra,* the court laid down the correct lines upon which grand juries should act in the following words: "Immunity from prosecution on indictable offenses, except by presentment by the grand jury, is declared and preserved by the organic law of this and all other states; and though, by reason of the secrecy of the proceedings of that body, its action is seldom brought into review, it cannot be doubted that one whose acts are there the subject of investigation is as much entitled to the just, impartial, and unbiased judgment of that body as he is to that of the petit jury on his final trial, nor that it is essential before the one body as before the other that private ill will or malevolence shall be excluded."

This principle was grossly disregarded in this case, and the grand jury went into their room, before having heard a word of testimony, with their minds biased against appellant. There is no answer to the query as to why the judge should have called the defendant by name in connection with his charge to the grand jury touching this crime, except that he, the judge, considered the defendant in the light of a lawbreaker and believed that he should be indicted.

The ancient practice of forcing grand juries by fines and imprisonment to bring in indictments against particular individuals has long since been regarded by civilized nations as a barbarity, and anything attempted along that line now would be regarded as criminal. The grand jury at any time may call upon the judge or district attorney for advice, and may, with all propriety, receive the same, but this advice must be confined to questions of law, and it is never the function of a court to charge a grand jury as to what particular person is guilty of a crime.

In the very recent case of *Blau* v. *State* this question is fully discussed by this court, and the principle distinctly laid down

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that our grand juries should be kept free from all outside influence whatsoever, and that any attempt by a trial judge to influence their findings constitutes reversible error.

It is always well for a prosecuting attorney and a circuit judge to be zealous in the discharge of their duties, and they should seek, by all lawful means, to free their district of vice and crime, but they should be exceedingly careful that their zeal for convictions does not lead them to do an injustice even to the humblest citizen. These same observations apply to the statement of the trial judge made when he denied appellant's motion for a continuance.

William Williams, attorney-general, for the appellee.

[The brief of the attorney-general was lost or withdrawn from the record before it reached the reporter.]

Argued orally by *Robert P. Thompson,* for the appellant, and by *J. N. Flowers,* assistant attorney-general, for appellee.

TRULY, J., delivered the opinion of the court.

The court met on the 5th day of September, 1904, and the grand jury returned the indictment against appellant on the fourth day of the term. When arraigned for trial, and before plea, appellant filed a motion to quash the indictment in his case. The ground on which this motion was based was the language of the trial judge in his charge to the grand jury at the impaneling thereof upon the organization of the court. The motion recites as follows: "That the said grand jury was, after being impaneled and sworn as such, charged by the court in the following words—to wit: 'Have you never heard the name of Charlie Fuller?' That such language was used by the court in that connection of his charge referring specially to the illegal sale of liquor, the duty of the grand jury to find indictments therefor. That by reason of such language said grand jury was unduly influenced against defendant, and his name specifically given to them as one who should be indicted by them." There

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was no denial on the part of the state of the facts alleged in the motion to quash, but the court, upon consideration, overruled the same, and this ruling of the court constitutes one of the assignments of error.

After the motion to quash had been by the court overruled, the appellant pleaded not guilty, and presented an application for a continuance of his case or postponement thereof to a future day of the term. We find it unnecessary to set out the grounds of the application in this connection. Upon presentation of the motion for a continuance the court overruled the same, and in his ruling remarked, "There has been much complaint over the state about the failure to convict these criminals;" the court continuing "that it feared much of this was due to the application of defendants' lawyers for continuance, the disposition of the courts to indulge it, and the lack of speedy trials." Exception was taken to this language, which was used in the presence and hearing of the petit jurors who had been impaneled for the week. The court stated, when the exception was presented, that he did not use the word "these;" the court only said "criminals throughout the state." Several lawyers, who were bystanders, were introduced to ascertain their remembrance of the exact language employed, and the majority of them were of the opinion that the court used the words as set out in the exception reserved by the defendant. This action and language of the court is also assigned for error. The motion for a continuance having been overruled, a jury was impaneled, the case tried, the defendant convicted, sentenced to the maximum penalty, and he appeals.

Many assignments of error are presented. Some we regard as not worthy of serious consideration. We confine our rulings to those questions involved in the necessary decision of the case. Those are two, and, as both are founded upon alleged improper language of the trial judge, as hereinbefore set out, though arising at different stages of the trial, we will consider them under the same head, without going into a refined discussion of each

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incident separately. It was said by this court in *Blau* v. *State*, 82 Miss., 521 (34 South., 153), through Price, J.: "In directing the attention of the grand jury to particular offenses or classes of offenses, to crime and the necessity of suppressing it, a very large, necessary, and useful discretion is conferred upon the presiding judge, and this court will not undertake to control that discretion unless manifestly abused." This was announced as the conclusion of this court after an able discussion of the powers and duties of the circuit judge, in the course of which numerous authorities are cited and analyzed. We have nothing to add to or take from the statement quoted. By § 2373, Code 1892, it is made mandatory for the circuit judge to charge the grand jury concerning its duties and to explain the law to it as he shall deem proper. It is required that he shall give certain statutes particularly in charge, and shall call the attention of the grand jury to its dyty to examine in reference to violations of such other statutes as he may deem proper under the circumstances as they then, to his knowledge, exist. Among the statutes which by law he is specifically directed to call to the attention of the grand jury is the one against the unlawful selling of intoxicating liquors, and others relating to vice of different kinds. The circuit judge is vested with power to specifically call the attention of grand jurors to all statutes which the public interest may require shall be brought to the consideration of the grand jury. This grant of power carries with it the authority to decide what class of offenses the public interest demands shall receive special attention by the grand jury. And in deciding this the circuit judge must necessarily be guided, to a great extent, by his knowledge of the social conditions as they exist in each county at the time when the grand jury is impaneled therein. Those statutes which may be most flagrantly and openly violated in one county of his judicial district may be strictly observed in another, and the same offense which is conspicuous for its presence in some communities may be equally as conspicuous for its absence in others. It would be folly to

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hold that a circuit judge should not be permitted to charge the grand jury in reference to a particular class of crimes, for the reason that such charge might have the effect of directing the attention of the grand jury to the individuals who are guilty of the crimes. In truth, this is the object at which the charge to the grand jury is aimed, the purpose which it hopes to effect. The circuit judge being a conservator of the peace, and, in the discharge of his duty, having the peace and quiet of the entire district much at heart, being well advised as to the conditions existing in every locality within his district, his charge to the grand jury is intended to direct their deliberations into the channel which will result in the greatest good to the people of the entire county where the grand jury is impaneled. But while it is the duty of the circuit judge to so direct the attention of the grand jury, and while he is vested with vast power and fullest discretion in choosing the statutes upon which he will base his charge to the grand jury, and while he stands as a sentinel to watch and guard the interest of the people, and has authority to suggest to the grand jury the course their investigation should take, he is not a prosecutor of any particular individual, no matter how flagrant and notorious his violations of the law by current report or popular rumor may be. It is the province of the circuit judge and his duty to inveigh against crime of all kinds and in every quarter, but it is a usurpation of power to denounce individuals, or to specifically direct the attention of the grand jury to any named person. It is not every man who is accused of crime who is guilty; and every man, whether accused or not, is entitled to the presumption of innocence until legally convicted. This presumption is binding upon the petit jury, and stands as a witness in favor of the defendant when on trial. It guards him before the grand jury until their investigations have produced proof believed by them which overthrows it. It protects him from the circuit judge in his charge to the grand jury, and forbids that any word from that high station, so apt, on account of its dignity and importance, to influence by its slightest

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utterance, should prejudice the grand jury when it enters upon the consideration of violations of the law. Every person accused of crime has the right to have his case investigated and passed upon by a fair and impartial grand jury, whose ears have never heard a suggestion of guilt from the presiding officer and whose minds have not been prejudiced by any statement showing the opinion of the trial judge. If the grand jury is to be kept free, as has been repeatedly announced by this court, from all undue outside influences, of what grave importance is it that this undue influence should not proceed from the very officers to whom they must look for guidance and whose decision and judgment they must take as the law! And the general observations made upon this line apply with equal force to all utterances of presiding judges which, during the progress of a trial, might inure to the prejudice of defendants accused of crime. "Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, to decide impartially." This rule of conduct embodies the wisdom of the ages, and has never been improved upon during all the lapse of time since enunciated by the ancient sage and philosopher. It is the duty of the trial judge to do all in his power to conserve the public interest, to see that the peace and quiet of the country are preserved, and to administer the law with firmness, yet with unswerving justice and impartiality. In the instant case we are constrained to hold that each of the assignments of error based upon the language of the trial judge is well taken. His charge to the grand jury, in which, by name, he called attention to a particular individual, and the connection in which the language was used, must necessarily have grievously biased the minds of the grand jurors against the person so invidiously singled out. It is no reply to this conclusion to say that the words as quoted in the motion to quash are not of themselves either denunciatory or accusatory of the person named. We must view this matter in a reasonable way. When we remember that the attention of the grand jury was at this very time being specifically directed to the violations of the law pro-

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hibiting the unlawful sale of vinous and spirituous liquors, and while the trial judge was impressing upon the grand jury the duty which their oaths imposed upon them to indict all violators of that law, the naming of any particular person in this direct connection was tantamount to a statement to the grand jury that, in the opinion of the trial judge, he, the party so named, was guilty of violating the statute then being discussed. From this point of view further discussion is unnecessary to show to any candid mind that such an utterance, made under such circumstances, must inevitably have infringed upon the constitutional right of the appellant to have his case investigated by a fair and impartial grand jury, free from all outside influences.

The remarks of the trial judge in overruling the application for a continuance were likewise unwarranted, and peculiarly unfortunate. However potential public opinion may be in many of the most important affairs of public and political life, surely it should wield no influence with the courts, or with the judges presiding at the trial of any person accused of crime, when passing upon the rights of the accused. The fact, if fact it was, that there was widespread complaint throughout the state about the acquittal of criminals, certainly constituted no reason why this appellant should be deprived of any of his rights. The heat of public opinion should not rise to the altitude of the high station occupied by judges nor be allowed to affect the administration of justice before the courts. The remarks of the trial judge are justly subject to criticism when viewed in another light. The appellant was not at that time, in the eyes of the law, in any sense a "criminal," and to so refer to him was an invasion of his rights, and must of necessity have operated to his prejudice with the jurors who were afterwards impaneled to try the case and in whose presence and hearing the remarks were made. Whether we accept as being accurate the language attributed to the trial judge in the bill of exceptions or that which he candidly acknowledges using, the effect was the same, and conveyed to the prospective jurors a distinct intimation

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that in the eyes of the trial judge the defendant who was then being called upon to answer the state upon the charge preferred against him was a criminal, and that his application for a continuance was simply a subterfuge resorted to in an effort to evade the law. We think such language inexcusable, and are inclined to believe with the district attorney, who testifies in the record that in his judgment it was "a slip of the tongue" on the part of the court; but, nevertheless, it placed an additional burden on appellant, and, in the absence of explanation or correction, operated to his prejudice. The rights of every individual accused of crime should be scrupulously guarded and free from invasion from any source. It is, of course, of great importance that every guilty man should be brought to justice, but it is of far greater and more vital importance that all, whether guilty or innocent, should receive a fair trial. This is the only protection afforded to the innocent who unfortunately may be accused of crime. The deliberations of the juries, both grand and petit, must be preserved inviolate from all outside influences, no matter from what source they emanate. The judge, by express statutory enactment, is forbidden to "sum up or comment on the testimony, or charge the jury as to the weight of evidence." It is certainly contrary to the policy of our law, and flagrantly violative of the fundamental principles of justice, for a judge to inject his opinion of the guilt of a defendant, based merely upon rumor or private information, into the minds of the jurors who may be impaneled to pass upon the question of his guilt or innocence.

We are convinced that the trial judge was merely led away by his zeal to see that the laws are enforced, with no thought of depriving the appellant of any legal right; but the rights here invaded are so vital in their nature that the infringement of them was practically a denial to appellant of his constitutional guaranty of a fair and impartial trial. The trial judge should have recalled that "virtue itself 'scapes not calumnious strokes."

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Appellant may be innocent notwithstanding rumors to the contrary may have reached the ear of the trial judge.

Reversed, motion to quash sustained, and cause remanded.

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JAMES WHIT v. STATE OF MISSISSIPPI.

CRIMINAL LAW. *Supreme court practice. Record not aided by evidence aluindo.*

The supreme court, on appeal in a criminal case, in passing upon the action of the trial court in denying a continuance, is confined to the record and cannot consider a certified copy of a subpœna issued for a witness nor an affidavit averring that he was present in court during the trial of the case, such papers not having been of record in the court below at the time of the trial.

FROM the circuit court of Tate county.

HON. J. B. BOOTHE, Judge.

Whit, the appellant, was indicted, tried, and convicted of murder, and appealed to the supreme court. He was erroneously denied a continuance by the court below. The facts upon which the decision turned are stated in the opinion of the court.

W. J. East, S. W. Jones, and *G. W. Lindsey,* for appellant.

William Williams, attorney-general, and *J. W. Lauderdale,* for appellee.

Argued orally by *W. J. East,* for appellant, and by *William Williams,* for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

The second application for a continuance should have been granted on the showing made by this record. The attorney-general, realizing this, has had filed here a certified copy of the

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original subpœna for Wat Lucket, showing that the subpœna was issued and executed May 4th, and an affidavit of the sheriff to the effect that the witness was present in court during the whole trial. But these papers were obtained after the adjournment of the court, and are not a part of this record, and cannot be looked to by us. If the original subpœna was on file when this application was made, and the witness was in attendance, it would have been easy to show these facts in answer to the application; but no such showing was made, so far as the record discloses. The twenty-sixth section of article three of the constitution, and the decisions thereunder, make reversal imperative.

Reversed and remanded.

CLIFFORD A. BONDS v. THOMAS J. LIPTON COMPANY.

1. **SALES.** *Cipher telegrams. Letters. Evidence. Statute of frauds. Code 1892, § 4229.*

   Where a contract for the sale of personal property is evidenced by letters between the parties, fully recognizing the existence and setting forth the terms of the contract, it is immaterial that precedent cipher telegrams do not sufficiently show a sale to take the case out of the statute of frauds.

2. **SAME.** *Rescission. Tender. Place.*

   Where goods were bought with the understanding that they were to be shipped by the seller to the buyer when the buyer thereafter ordered, and the buyer recognized that the seller held the goods on his account, it is not necessary for the seller to tender the goods to the buyer at the latter's place of business after he gives notice that he will not receive them if shipped, in order to hold the buyer liable for a breach of the contract.

3. **SAME.** *Breach of contract. Custom.*

   Where the meat contracted for was "smoked meat," it is immaterial that the meat sold upon breach of contract by the seller for the purchaser's account was not smoked, it being shown that

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the meat was sold to be shipped on the buyer's order, that "smoking" was a process to which meat is submitted, according to the custom of the trade, only immediately prior to shipment, and that the buyer failed to give shipping directions.

4. SAME. *Harmless error. Evidence.*

The erroneous admission in evidence of copies of telegrams is not ground for reversal of a judgment predicated of a contract which the copies were intended to establish, if the contract be otherwise fully proved by competent and undisputed evidence.

FROM the circuit court of, first district, Hinds county.

HON. DAVID M. MILLER, Judge.

The Thomas J. Lipton Company, a corporation, the appellee, was plaintiff in the court below; Bonds, appellant, was defendant there. From a judgment in plaintiff's favor defendant appealed to the supreme court. The opinion states the case.

Harper & Potter, for appellant.

After the evidence had all been introduced, the appellant asked for a peremptory instruction, directing the jury to find for him for several reasons: (1) Because, under the statute of frauds, the cipher telegrams, interpreted as above shown, do not sufficiently show a sale. (2) Because the Lipton Company never made an offer to deliver the meat. (3) Because the reselling, under the circumstances of the case, was a rescission of the contract. (4) Because the copies of the telegrams offered in evidence over the objection of appellant were incompetent, and no proper proof of the contract had been made.

The court below, over the objection of defendant, gave to the jury an instruction to find for the plaintiff in the sum of $250. This was objected to then, and is now, for the reasons above given, and because, if the plaintiff could recover at all in this case, it would be for the difference between the purchase price and the market price on the 1st day of May, which would be the date of the breach of the contract, and the record shows that meat of the character in question was twenty-five points higher on the 1st day of May than on the date of the sale to Jackson Bros. of June 22d. And based on these figures, if the

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meat had been sold in a reasonable time after the breach and expiration of the contract period, the loss would have been but little more than $300; whereas, according to the sale made June 22d, fifty-two days after the expiration of the contract period, the loss exceeded $500. Another reason why appellant contends that he ought not to be bound by the reselling is that the meat negotiated for was bacon or smoked ribs, whereas the meat resold to Jackson Bros. was dry salt, or unsmoked ribs. The record shows that prior to the time of the trial of this case the action had been dismissed against J. C. Hood upon payment by him of $250. There was a verdict and judgment against appellant for $250.

The contract in the suit is an executory one, as the only participation in what was done by Hood & Co. prior to the expiration of the contract term was the sending of the telegram: "Book us subject to your confirmation 50,000 pounds bacon ribs, 40/45 average at 11/10 buyer's option April." Whatever else was done by the Lipton Company, as shown by the witness, Dunne, was wholly without the consent or participation of the buyers. Under the agreement the Lipton Company were not required to set apart any particular meat, and if that was done, as testified by Dunne, in case of loss by fire, it could not be held to have been the property of Hood & Co., but, on the contrary, they would still have the right to expect a delivery of the meat in Jackson at the end of the contract time. In other words, the meat would not, by reason of anything they had done, become their property absolutely until delivery was made at Jackson, Mississippi. *Berry* v. *Waterman,* 71 Miss., 497; *Ouilette* v. *Davis,* 69 Miss., 762; *Wilson* v. *Empire Dairy-Salt Co.,* 63 N. Y. Supp., 565.

"Where property sold is agreed to be delivered between certain designated dates, it is optionary with the purchaser to designate on which day he will receive it, and his failure to do so fixes the last day as that on which he may be required to perform the contract." *Sousely* v. *Burns,* 10 Bush. (Ky.), 87.

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J. C. Hood & Co. having remained silent as to shipping directions, it became the duty of the Lipton Company, under the contract, to actually tender the meat at Jackson upon the last day of the contract term, the appellant having given no intimation that it would not be received. Neither party can maintain an action merely and simply on the ground that the other party has not performed his covenant. *Chandler* v. *Robertson,* 9 Dana (Ky.), 295; *Clark* v. *Fey,* 51 Hun., 639 (4 N. Y. Supp., 18); *Hill* v. *Blake,* 97 N. Y., 216; *Gehl* v. *Produce Co.,* 105 Wis., 573.

"The weight of authority is that a sale without notice is an abandonment of the contract." And this is put upon the ground that the buyer has an interest in the article when held by the seller, and that he must be notified in order to give him an opportunity to protect his interest, and to either buy himself or to make the article bring the best possible price. Any other rule than this might lead to disastrous consequences, especially with articles not staple and that had no fixed market value. *Leonard* v. *Portier,* 15 S. W. Rep., 414; *Kemper* v. *Heidenheimer,* 65 Tex., 567; *McClure* v. *Williams,* 5 Sneed, 718; *Richmond* v. *Smock,* 28 Ind., 365; *McEachron* v. *Randles,* 34 Barb., 301; 2 Benjamin on Sales, sec. 1164, note 2; Story on Sales, sec. 314; 24 Am. & Eng. Ency. Law (2d ed.), 1140, and cases there cited.

The court will see that the proof of contract was made by copies of telegrams, and that the originals were not in evidence, nor was it shown that the originals could not be produced.

The court will see that the trial judge, by the instruction for appellee, fixed the measure of damages based on the resale. This, we think, was clearly erroneous. "Where an article is to be delivered at a certain place, on or before a day named, the breach can only occur on the last day named, and the damages will be the difference between the value of the article on that day and the contract price." *Phelps* v. *McGee,* 18 Ill., 155.

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We do not deny that where the goods were tendered and refused, the seller may resell the property; but the rule is not without qualifications, among which is the one that the resale must be within a reasonable time and absolutely fair, looking to the best interest of the buyer, and after notice to him of a purpose to resell. *Clure* v. *Jamieson,* 182 U. S., 461; *Penn* v. *Smith,* 98 Ala., 560; *Camp* v. *Hamlin,* 55 Ga., 259; *Roeblings Sons Co.* v. *Fence Co.,* 130 Ill., 670; *Bagley* v. *Findlay,* 82 Ill., 526; *Saladin* v. *Mitchell,* 45 Ill., 85; *Linseed Oil Co.* v. *Kearney,* 14 La. Ann., 352; *Rickey* v. *Tenbroeck,* 63 Mo., 567; *Ackerman* v. *Rubens,* 167 N. Y., 405; *Smith* v. *Pettee,* 70 N. Y., 13.

Whether a discretion to resell is exercised properly and in good faith is a question of fact for the jury. *Lewis* v. *Greder,* 51 N. Y., 231.

J. H. Thompson, for appellee.

There was no question raised in this case which should have been submitted to a jury. The testimony indisputably shows that the firm of J. C. Hood & Company violated their contract of purchase; that the Lipton Company stood ready, willing, and anxious at all times to comply with the terms of the sale; that they exercised care and prudence in disposing of the goods when they resold them to third persons, and that they suffered loss for which Hood & Company were responsible. The testimony of Mr. J. C. Hood—and it is to be remembered that he was one of the defendants to the suit—conclusively shows a liability on the part of his company, explains fully the custom of the trade in the carrying on of such transactions, and, taken with the testimony of the witness Dunne and the letters of defendant Bonds himself, leaves no doubt as to the propriety of the action of the trial court. It is a significant fact that defendant Bonds does not come upon the stand to testify in the case. The record justifies the inference that the secret of this matter being in court is the dissolution of the firm of J. C. Hood & Company, and the dispute between the members thereof, J. C.

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Hood and C. A. Bonds, and the equally clear inference that there would have been no dispute between the Lipton Company and defendant, and this claim would have been paid, had Hood and Bonds remained in partnership or dissolved with a satisfactory understanding of the terms of dissolution. But any disagreement between Hood and Bonds as to the particulars of their dissolution early in May can have no bearing upon appellee's rights. Appellee sold the meat to J. C. Hood & Company. Hood recognizes the rights of appellee; he clears the whole transaction up by his testimony, and rather than put himself in the attitude of fighting a just claim in the courts of the country, he pays $250 for a dismissal of the suit as to him, and takes his chances of making this money back out of Bonds under their contract of dissolution wherein Bonds assumes liabilities of the firm. Bonds, in his letters, recognizes the justice of appellee's claim, and does not deny liability to the Lipton Company; but he, unlike Mr. Hood, fights the claim, and, as the record will show, attempts to defend upon technical grounds alone. In Bonds' first letter on the subject, he says: "I have purchased the business, but this matter belongs to Mr. Hood, who will arrange the matter satisfactorily with you. Please keep me advised as to the two cars of ribs if Mr. Hood does not arrange the matter satisfactorily." As before stated, the Lipton Company knew only the firm of J. C. Hood & Company in this transaction, hence any claim of Bonds that this matter belonged to Hood can have no bearing in this case. As to this, note Bonds' next letter on the subject, wherein he states: "Please advise what you will charge to cancel this contract, unless Mr. Hood's letter to you is satisfactory. And upon receipt of the above information I will take up the matter and arrange to your satisfaction." It is true that Mr. Hood wrote appellee as late as May 14 that he expected to "place" these cars without any loss, and Bonds writes that he "will see Mr. Hood" about the matter, and on May 30 Mr. Bonds writes, among other things: "It looks as if Hood & Company are going to have a loss." It

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is to be borne in mind that this is written long after the month of April had passed, by the defendant, himself a broker, and of course advised of the custom of the trade in such dealings, and it is submitted that, taken with the other evidence herein, this disposed of the claim of appellant that when the last day in April had passed the contract was at an end, and that appellee should have sold the meat to third persons on that day. The fact that Hood & Company did not call for same in April did not amount to a rescission of the contract *eo instanti*; nor was it so treated by either party to the deal. It is also to be borne in mind that after the early part of May Bonds was the owner of the business of J. C. Hood & Company. Bonds writes still further on June 24, after receipt of Lipton's letter of June 22, in which he was advised that the meat had been sold to third persons by said Lipton Company: "It will be necessary for you to look to the firm of J. C. Hood & Company for collection." An admission of the justness of the debt which he is now here trying to evade by technicalities and quibbles; not onc word in the nature of a denial thereof, only something in the nature of a complaint against Hood—a matter wholly between himself and Hood, and which can have no effect whatever upon the rights of the appellee.

It is submitted that these letters of Bonds, all the correspondence, and all the other evidence in the case are one way, showing conclusively that, according to the customs of trade and the ordinary course of business of meat dealers and brokers, and the contemplation of all parties in interest, there was an absolute sale, a wrongful violation of the terms thereof by the purchaser, and a loss occasioned to the seller for which the seller is entitled to recover. I am unable to see how anything in this record can be construed as casting doubt upon this proposition, or how it could be maintained that the trial court could have done otherwise than as it did.

Appellant's contention as to the statute of frauds is without foundation, and his exception to the introduction of the tele-

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grams in question is not well taken. It will be noted that the telegrams, exhibits to the testimony of the witness J. T. Dunne, are the originals received by the Thomas J. Lipton Company—that is, they are the original papers delivered to said Lipton Company at Chicago by the telegraph company; and the copies of the telegrams sent by the Lipton Company to appellant, which are attached to said deposition, were kept by the Lipton Company in the due course of their business. 27 Am. & Eng. Ency. Law (2d ed.), 1091.

The case of *Shingleur* v. *Telegraph Co.,* 72 Miss., 1030, is distinguishable on this subject from the case in hand. In this case there is no question about the correct transmission of the messages, while in that case there was an incorrect transmission by the telegraph company, and that was a case wherein the telegraph company was a party to the suit, as defendant to a claim for damages.

"Proof of the sending of a telegram accepting an offer made and completing a contract is sufficient evidence of subscription to take the case out of the statute of frauds." 23 Century Digest, citing *Trevor* v. *Wood,* 93 Am. Dec., 511.

It was not necessary for the Lipton Company to bring the meat to Jackson and make an actual tender thereof to defendants. After they saw that defendants would not accept the meat, after they had reached the entirely reasonable conclusion that to bring the meat to Jackson would only add to their loss and expense; after they had waited a reasonable length of time, insisting all along, by letters and telegrams, upon Hood & Company's coming up to their part of the contract, and saw that Hood & Company would not accept the meat, it was their duty to dispose of it to the best possible advantage, so as to reduce the amount of loss as much as possible.

Argued orally by *W. R. Harper,* for appellant, and *J. H. Thompson,* for appellee.

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TRULY, J., delivered the opinion of the court.

On March 4, 1903, J. C. Hood & Co., a partnership composed of J. C. Hood and C. A. Bonds, doing a brokerage business at Jackson, Miss., closed a contract of purchase with the Thos. J. Lipton Company, meat dealers of Chicago, Ill., for 50,000 pounds of bacon ribs, at a price named. The negotiations were conducted and the contract concluded by telegraphic communications, which were sent in a cipher in use by the parties. The final telegrams, consummating the contract of purchase, were as follows: One from Hood & Co. to appellee in these words: "Book us subject to your confirmation 50,000 pounds bacon ribs, forty to forty-five average, at 11-10 buyer's option April." On the same day the Lipton Company wired confirmation of the sale as follows: "Booked 50,000 lbs. bacon ribs 40 to 45 average 11-10 buyer's option April." During the month of April, J. C. Hood & Co. failing to transmit shipping orders to appellee, several communications, both by letter and telegram, were sent by appellee to Hood & Co., requesting directions as to shipment and delivery. These were not responded to. After the expiration of the month of April, appellee wrote J. C. Hood & Co. that, as they had failed to receive any shipping instructions in reference to the 50,000 pounds of bacon ribs sold them, they had been, in accordance with established custom, placed in storage for the account of Hood & Co., and that the usual storage charge of 10 cents a month per 100 pounds would be charged. During the month of May the firm of J. C. Hood & Co. dissolved, C. A. Bonds purchasing the interest of J. C. Hood. From the date of this dissolution a great deal of correspondence was carried on between the individual members of the late firm of J. C. Hood & Co. and the appellee in reference to the meat purchased and then held in storage by the Lipton Company for Hood & Co. No definite conclusion was arrived at, and, the matter being unadjusted, on the 22d of June the Lipton Company, in open market, in the city of Chicago, sold the 50,000 pounds of meat which had been stored

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for Hood & Co. for their account, and credited the proceeds. From the date of the purchase of the meat, on March 4th, until the day of the sale, on June 22d, the market price of this class of meat had steadily fallen, so that, after crediting the proceeds of the meat on June 22d, there remained due the Lipton Company the sum of $550. For this amount appellee filed its suit against J. C. Hood & Co. After the institution of suit, J. C. Hood individually paid $250 to appellee in settlement of the amount due by him on the contract. The suit proceeded against C. A. Bonds. At the conclusion of testimony the court gave a peremptory instruction in favor of appellee for $250. From this judgment C. A. Bonds appeals, and assigns four grounds of error, which will be discussed in the order of presentation.

It is said the contract is void under the statute of frauds, and that the cipher telegrams, interpreted as above shown, do not sufficiently show a sale. But the inescapable reply to this contention is that the letters which passed between appellee and J. C. Hood & Co. and C. A. Bonds distinctly recognize the existence of a contract, and set forth with absolute certainty the details of the transaction. See letter of appellant "respecting two cars of ribs purchased by Mr. Hood" and asking to be kept advised. In addition to this, J. C. Hood, the member of the firm by whom the contract was made, admitted the contract and acknowledged the correctness of the cipher telegrams as transcribed; and this undisputed testimony, when considered in connection with the letters, clearly establishes the consummation of the contract.

It is next said that the appellee is not entitled to recover because the Lipton Company never made an effort to deliver the meat, and it is contended that it was the duty of the appellee to have the meat actually transported to the city of Jackson, and there tendered Hood & Co. The reply to this is that the meaning of the technical phrase "buyer's option April" is that it is for the buyer to give shipping orders if, and when, he desires the meat to be actually delivered. This meaning is made

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evident by the testimony of Mr. Hood and by the depositions of the employes of the appellee, and is nowhere disputed in this record. Under the terms of the existing contract, therefore, the appellee was not bound to make any actual delivery or tender of the meat unless previous shipping orders had been given it by the purchasers. This fact is clearly recognized in the letters from C. A. Bonds to the appellee, and in some of those letters written subsequent to the last of April, the date when counsel for appellant contends the delivery ought actually to have been made, Mr. Bonds impliedly admits that the meat is being held for the account of Hood & Co., and acquiesces in that arrangement, inquiring of the Lipton Company what their "carrying charge" amounted to—meaning, of course, the cost of having the meat kept in storage, in the hope of an advance in price, so that the loss which he then recobnized as inevitable, and his liability for which he did not deny, might be reduced to a minimum. Note appellant's letter of May 30th, in which, after stating when he first acquired knowledge of the purchase of the meat and his desire to arrange the matter, he proceeds: "It looks as if Hood & Co. are going to have a loss. In order to get out of the matter, what is your carrying charge? It is thought we will have higher meat, and can possibly get out of it by carrying it thirty or sixty days." Under the facts of this record, and the terms of the contract as construed by Hood and the appellee, and not denied by the appellant, and the course of dealing between the parties, we do not think it was incumbent upon the appellee to have had the meat actually transported to the city of Jackson and tendered to a customer who had already evidenced his intention of not receiving it. The action of appellee in this regard was for the best interests of all concerned. To have brought the meat to Jackson would simply have been to have added the transportation charges to the loss of Hood & Co., and would have placed this large quantity of meat on a smaller market for a forced sale, when, as shown by the correspondence of Hood & Co., they had been unable to make any sale of it. It is in

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testimony, and undenied, that meat in such quantities could be disposed of to a better advantage in Chicago upon the open market than at any smaller place. In the absence of contradiction, we must take this statement as true.

It is next argued that appellee is not entitled to recover because the reselling of the meat, under the circumstances of this case, was a rescission of the contract, and it is urged that, in truth, there never had been any actual sale of any specific lot of meat to Hood & Co.; that there had been no segregation of this quantity of this particular class of meat by the appellee. But here, again, the appellant is met by the uncontradicted statement of the agents and employes of the Lipton Company, who testified that there was in fact an actual segregation and setting apart of the specific quantity of the particular class of meat sold to Hood & Co., and that from the date of the purchase, on March 4th, to the date of the sale, June 22d, the Lipton Company had in its warehouse never less than the identical amount which Hood & Co. had purchased, and, when the supply of this special class of meat was reduced to the quantity which Hood & Co. had purchased, appellee's offering list showed no offer to sell any meat of that special kind. It is suggested by appellant: Suppose the meat had been destroyed by fire or other casualty while in the warehouse in Chicago after March 4th, would the court have held the loss to have been entailed upon Hood & Co.? Had the loss occurred prior to the time when the buyer's option expired, undoubtedly not, for the reason that the very term "buyer's option April" permits the buyer to allow his meat to remain without risk or cost to him until the date of the expiration of the option given by the terms of the contract. If the loss had been after the meat was actually placed in storage for the benefit of Hood & Co., then the question of loss of the meat upon destruction by casualty would depend on the terms and condition of the storage, and cannot be answered with any degree of certainty from the facts detailed in this record. But it is said that the reselling of the meat under the circumstances

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shown by this record was a rescission of the contract, because the meat actually sold on the market by the Lipton Company was not what is denominated "smoked meat," whereas the meat contracted for by Hood & Co. was of that class. But this objection vanishes in the light of the testimony, which shows that smoking is simply a process which the meat is subjected to immediately prior to shipment, and, inasmuch as the buyer failed to give any shipping directions, it was never necessary to put the additional expense entailed by the smoking process upon the buyer, and the record shows that this is credited on the statement of account between the parties.

Lastly, it is urged that the copies of the telegrams offered in evidence were incompetent, and that no proper proof of the contract was made. We have shown in our consideration of the first objection that the proof of contract does not depend upon the copies of the telegrams alone, but is also shown by the letters, the genuineness of which was not denied. We find it unnecessary to enter upon any extended discussion of the question as to the admissibility as evidence of copies of telegrams, for the reason that, even if in the instant case they were inadmissible, it could avail the appellant nothing, because, with them out of the record, the proof of the contract, in all of its terms and conditions, is specifically made, and, more than that, acknowledged by the member of the firm who made the contract, and who has not only acknowledged his liability for a proportionate part of the loss, but has promptly acquitted himself thereof by payment in full.

None of the assignments of error are tenable. The appellant has no cause to complain at the amount of the judgment. It is, in truth, something less than was warranted by the proof.

Affirmed.

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WIRT ADAMS, STATE REVENUE AGENT, v. THOMAS M. COKER, ADMINISTRATOR, ET AL.

1. COUNTY TREASURERS. *Failure to report.* *Code* 1892, § 902.
A county treasurer is not liable to the penalty for failure to make reports to the board of supervisors, as required by Code 1892, § 902, where the failure was not caused by an unwillingness or default on his part, but resulted from a request by the members of the board to postpone the making of them.

2. SAME. *Commissions.* *Code* 1892, § 2016. *Political year.*
A county treasurer's commissions should be estimated on the basis of the political year, beginning the first of January and ending the thirty-first of December, and not on the basis of the fiscal year, beginning the first of October and ending the thirtieth of September.

FROM the chancery court of Union county.

HON. HENRY L. MULDROW, Chancellor.

Adams, state revenue agent, the appellant, a state officer authorized by law (Laws 1894, p. 29) to sue for and recover all sums due the state, counties, etc., from defaulting officers, taxpayers, etc., was complainant, and Coker, administrator, and others, the appellees, were defendants in the court below. From a decree largely in favor of the defendants the complainant appealed to the supreme court.

Smallwood was county treasurer of Union county, Miss. He died, and Coker, the appellee, qualified as the administrator of his estate. The other appellees were the sureties on Smallwood's official bond. This is a suit in chancery brought by appellant against appellees to recover the sum of $315.91, alleged to have been misapplied by Smallwood; also the sum of $250 as the penalty prescribed by Code 1892, § 902, for failing to make the report required by law to the board of supervisors of the money received by him as treasurer and the disbursements, at the meeting of said board in January, 1893. As

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to the breach of the bond alleged, in not making the report to the board of supervisors at its January, 1893, meeting, it appeared that the board had a great deal of business at that meeting, and that one of the members of the board, at the request of the other members, requested Smallwood not to make the report, because the board would not have time to go over it; that Smallwood was ready and willing to make the report at all times, and only refrained from doing so at the informal request of the members of the board of supervisors. As to the $315.91 sued for, the chancellor, after hearing the evidence, found that to calculate the commissions of Smallwood, as county treasurer, from the first Monday in January, 1893, to the first Monday in January, 1894, he overdrew his commissions $315.91, but to calculate the commissions for the fiscal year beginning on the 1st day of October and ending on the 30th day of September for said years, he overdrew his commissions only 49 cents. The court below held that the law required the commissions to be calculated for the fiscal year, and rendered a decree for complainant for 49 cents and the statutory penalty of double damages thereon. The court also found that Smallwood did not make a report as county treasurer to the board of supervisors at its January, 1893, meeting, but held that he was not liable, under the facts of the case, for the penalty for not so doing.

W. Lee Crum, for appellant.

On the count for actual shortage it is the contention of the appellant that the commissions of a county treasurer under § 2016, Code 1892, are to be calculated on the funds received by him, except what he may receive from his predecessor in office, after he goes into office on the first Monday in January succeeding his election, and on such funds he is entitled to have allowed him by the board of supervisors of his county two and one-half per cent on the first twenty thousand dollars and one

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per cent on the remainder, provided he shall not receive more in any political year than one thousand dollars.

By virtue of sec. 257 of the state constitution of Mississippi, a political year begins on the first Monday of January of each year. Sec. 3051, Code 1892, provides that a county treasurer's term of office begins on the first Monday in January succeeding his election, when elected at a regular term. Then Smallwood, who was elected in the fall of 1892, began his term of office on the first Monday in January, 1893.

Code 1892, § 2016, regulates and fixes the commissions to be allowed county treasurers, and the word "year" therein means a political year, and not a fiscal year. Under common usage and § 1521, Code 1892, the word "year" would mean a calendar year, if a contrary intention was not expressed; but a contrary intention is clearly expressed, for the term of Smallwood's office began the first Monday in January, 1893, and then it was that his commissions for that term began to accrue.

The fiscal year began October 1st, 1892, and to hold that a county treasurer, who is not inducted into his term of office until January thereafter, can calculate his commissions for that term of office from the beginning of the fiscal year, or from the first day of October prior thereto, is to hold that he shall receive commissions on money received from his predecessor, which is prohibited by law just cited, and appears absurd. Code 1892, § 1521, and sec. 257 of the state constitution seem to be in perfect accord; the latter defines and the former refers to a political year.

It plainly appears from the facts and the law that Smallwood had no legal excuse for not making his report, and if living himself would be clearly liable to pay the penalty. If liable in his life, the action survives against his estate. Code 1892, § 1916.

This failure was also a breach of his official duty, and a breach of his official bond, which provided that he "would faithfully perform all the duties of said office during his continuance

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therein." The courts hold that this penalty is not to be held against the bondsmen, because it is designed as a punishment and should only go against the party who commits it and his privies in estate. But he, as principal on his said bond, which is put in suit here. was liable separately on his bond, which is both joint and several; and if liable in his life, his estate is now liable.

Fontaine & Fontaine, for appellees.

There was no error in the action of the court below in entering the final decree in this cause. The compensation of a county treasurer, as allowed by statute, is two and one-half per centum on all sums not exceeding two thousand dollars, but not to receive more than one thousand dollars for compensation. Code 1892, § 2016.

The treasurer's commission is paid out of the treasury, and is a part and parcel of the expense of government, and must be provided for by the board of supervisors in making levies for defraying expenses of government. All schemes of taxation are annual and prospective in their character. *Foote* v. *Brown,* 60 Miss., 160. And the board of supervisors, at its regular meeting in September of each year, shall levy the county taxes. Code 1892, § 314.

After the levy shall have been made and assessment approved, the clerk shall deliver to the tax collector a copy thereof on or before the first day of October, beginning of fiscal year. Code 1892, § 1394a.

The tax collector shall immediately proceed to collect the taxes, etc.; make report in writing on the first day of each month, or within ten days thereafter, to the clerk of the board of supervisors of all taxes collected by him during the preceding month, and at or within same time pay over all taxes collected to county treasurer. His final report and settlement for taxes of any fiscal year shall be made on or within ten days after the first day of September of the same year. Code 1892, § 3840.

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The levy, collection of taxes, and payment to treasurer must be during and in the fiscal year to defray the expenses of government for that year, and the board of supervisors made settlement with the treasurer on that basis, which we contend is correct. It is shown from the reports of December, 1892, February, May, July, and October, 1893. The October settlement should be taken because it necessarily includes payments to treasurer from the collector on his September settlement, a total receipt of $26,403.98, and his entire commission on the amount is the sum of $564.04, after paying back the sum of $19.47, commissions overdrawn. The treasurer could have only gotten his commission for the year 1893 from this amount. The sum levied and collected for the expenses of government for one year cannot be applied to payment of indebtedness or commissions for another year. We are aware that the term "year" used in any statute means a calendar year unless the contrary intention is expressed. Code 1892, § 1521.

A fiscal year is meant, and by express statute it is declared. The taxes on which he receives his commissions are levied by the board of supervisors in September for the succeeding fiscal year, are to be collected, paid over to the treasurer, and final report to be made during the fiscal year, and commission is allowed the treasurer on no other amount. All matters of finance and expense of government are embraced in the fiscal year.

The penalty for failure to make report to board of supervisors in January, 1893, Code 1892, § 902, cannot be collected in this cause. It is conceded that the sureties on the official bond are not liable for the forfeiture or penalty declared by the statute, because it is in the nature of punishment to the officer and is additional to liability on official bond. *Lafayette County* v. *Hall,* 68 Miss., 719.

Because, being in the nature of a punishment to Smallwood, who died some time before the institution of this suit, it cannot be collected against his estate, the punishment does not follow

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him into his grave. *Wagner* v. *Gibbs,* 80 Miss., 53. And a court of chancery will not enforce penalties except under very peculiar circumstances. *Railroad Com.* v. *Railroad Co.,* 78 Miss., 750.

The testimony shows that Smallwood was in no willful default in making his report; that he was ready and willing to make it, and only refrained from making it at the instance of the board of supervisors, which was pressed for time at that meeting of the board. While it is true that this evidence is not competent to establish any action of the board of supervisors—this can only be done by the record—yet it is competent to show that there was no disposition on the part of Smallwood to evade the statute, and that he did not willfully fail to make his report; and punishment is only to be inflicted for such willfulness, and no such proper case is made for the enforcement of the forfeiture or penalty in a court of equity.

WHITFIELD, C. J., delivered the opinion of the court.

The court below erred in estimating the commissions of the treasurer on the basis of the fiscal year. They should have been estimated on the basis of the political year, from January to January. It is clear from the testimony that there was no willfulness on the part of the treasurer in not making his report, and, on the whole record, we do not think the penalty recoverable.

Reversed and remanded.

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WILLIAM H. HANCOCK v. HENRY C. DODGE.

1. CONSTITUTIONAL LAW. *Constitution* 1890, *sec.* 147. *Equity jurisdiction. Supreme court.*

   The supreme court is forbidden by the terms of Constitution 1890, sec. 147, to reverse a decree of the chancery court because of any error or mistake as to whether the case in which it was rendered was of equity or common-law jurisdiction.

2. LAND BROKERS. *Commissions. Part payments.*

   A broker's commissions for the sale of land are due and payable when the sale is completed, in the absence of an agreement extending the time for their payment, and not on collection of deferred purchase money payments.

3. SAME. *Contract for commissions. Statute of frauds. Code* 1892, § 4225, *par.* (c).

   The statute of frauds in reference to oral agreements for the sale of interests in land, Code 1892, § 4225, par. (c), does not affect an agent's right to compensation for selling land pursuant to oral instructions.

FROM the chancery court of, second district, Coahoma county. HON. CAREY A. MOODY, Chancellor.

Dodge, the appellee, was complainant, and Hancock, appellant, defendant in the court below. From a decree overruling defendant's demurrer to complainant's bill of complaint, the defendant appealed to the supreme court.

Maynard & Fitzgerald, for appellant.

The written instrument sought to be reformed is a mere offer of sale, and not a contract. Appellee seeks to avoid that by calling it a "memorandum" of the contract, which, however, is not shown by the bill to have been agreed on between the parties to evidence the completed oral contract between them.

The paper shows on its face that defendant offered to sell his interest at $15 per acre. It does not show, however, that he

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would accept $15 per acre from "a purchaser to be found by complainant.' But even if it did, it was an offer merely, and not a contract. It was not accepted nor signed by complainant, and hence was not binding on him; and no consideration was paid by him to the defendant. This offer could not become a contract until accepted by the complainant. It was not accepted, because he never tendered the money nor offered to do so. The assent of the minds of both parties is necessary to constitute a contract, hence it follows that the person who makes an offer can at any time recall it before acceptance. Where time is not named in an offer within which acceptance may be given, the offer must be taken advantage of within a reasonable time, else it expires or become void. *Echols* v. *Railroad Co.,* 52 Miss., 616.

A court of chancery will not interfere to reform a written contract where it is such as the parties themselves designed it. "If they voluntarily chose to express themselves in the language of the written contract, they must be bound by it; for there is no general rule better settled, nor more just in itself, than that parties who would enter into written contracts must be governed by them as made, according to their true intent and meaning, and must submit to the legal consequences arising from them." *Williams* v. *Hamilton,* 65 Am. St. Rep., 485, note and authorities.

The bill charges that the defendant intended to add other matters to his memorandum. This court cannot consider that. The written contract, being clear, definite, and unambiguous, precludes all inquiry as to other intentions than those expressed in the written instrument.

If a party to a written contract, through his own negligence, acts thereunder, without knowing or understanding its contents when he has an opportunity to do so, a court of equity will not reform it so as to make it express his alleged understanding of what it was to contain; for an error which is the result of inexcusable negligence is not a mistake from the results of which a court of equity will grant relief. He who asks relief on the

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ground of mutual mistake shall show that he has exercised at least the degree of diligence which may be fairly expected from a reasonable person. *Williams* v. *Hamilton,* 65 Am. St. Rep., 500, note and authority; Bispham's Prin. of Eq., sec. 17; *Jurgensan* v. *Carlson,* 97 Iowa, 627.

It is the duty of a party in the absence of fraud to acquaint himself with the terms of a written contract to which he is a party before he enters into it. 27 L. R. A., 322; *Barnard* v. *Kellogg,* 77 U. S., 162; *Gilbert* v. *McInnis,* 114 Ill., 28; *Tilly* v. *Chicago,* 103 U. S., 162 (26 L. ed., 377); Wharton Ev., secs. 961, 1028, 1029, 1243; *Pindar* v. *Resolute Ins. Co.,* 47 N. Y., 114; *Linington* v. *Strong,* 111 Ill., 152.

A written contract cannot be reformed by oral testimony establishing a verbal contract directly in conflict with the terms of the written contract; such evidence is only admissible to explain, add to, or modify what is written, and never to contradict its express terms. *Barnard* v. *Kellogg,* 77 U. S., 162.

To justify a reformation of a written contract on the ground of mistake unmixed with fraud, the authorities are unanimous that the mistake must be mutual, or common to both parties. *Williams* v. *Hamilton,* 65 Am. St. Rep., 475, and note on p. 490.

"In order to justify a decree for reformation in cases of pure mistake, it is necessary that the mistake should have been mutual, and that the alleged intention to which he desires the writing to be made conformable should be continued concurrently in the minds of both parties, down to the time of its execution." Bispham's Prin. of Eq., sec. 469.

J. W. Cutrer, for appellee.

There is no dispute as to the terms and conditions of the contract entered into between the appellant and the appellee; the demurrer admits all the allegations of the original bill of complaint. So that, having determined that the appellant and the appellee entered into a contract for the sale by the appellee (Dodge) of appellant's (Hancock's) land, the terms of which

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are not disputed by either party, and having further determined that there is a clear and unambiguous contract in existence agreed to by both sides, the question to be settled by this appeal is, Has the appellee the right to any, the least, reformation of his writing so that it shall conform to the common standard, the contract?

It will be observed that there is no demand that the contract itself shall be reformed so that the parties thereto shall be restored to all their rights and privileges. The terms of the contract are settled, and the question now to be decided is whether or not this little slip of paper, containing a couple of lines of writing, shall be put in such shape that it shall conform to the undisputed intention of the parties; or shall the appellee be turned out of court and be sent to trial in a court of law with certain defeat staring him in the face?

Appellee alleged in his original bill that the memorandum "was intended to set forth the agreement between complainant and defendant," but that by "inadvertence, accident, and mistake in the drafting thereof, and by misapprehension of the parties as to the sufficiency of said writing to express the said agreement fully," appellee would be unable to recover on the contract in a court of law; that the memorandum on its face appeared to be simply an offer of sale by Hancock to Dodge, and that the patent ambiguity of the description of the land would be fatal to Dodge's right to recover at law.

Appellee earnestly contends that on the pleadings and the above state of facts the court below was amply justified in overruling the demurrer to the original bill. Whether the question be treated as a mistake of law, or a mistake of fact, or as an accident, the principle is applicable that equity will not let him suffer who has performed his entire contract and is not in default, as against the other party, who has received all the benefit he bargained for and yet has not in a single particular carried out his agreement.

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Shall we say, in this case, that the mistake complained of is a mistake of law? Even if so, the mistake is not as to the terms of the contract, but only as to the writing, which evidences the contract as made. And in such case the authorities are overwhelmingly to the effect that such a mistake will be reformed. 2 Pom. Eq. Jur., sec. 845; *Hunt* v. *Rousmainere*, 1 Pet., 1; *Sparks* v. *Pittman*, 51 Miss., 511; *Goodbar* v. *Dunn*, 61 Miss., 622.

CALHOON, J., delivered the opinion of the court.

This is an appeal, to settle the principles of the case, from a decree overruling Hancock's demurrer to Dodge's bill in equity, which bill is to reform a contract so as to make it conform to the agreement and intent of the parties, and for general relief.

The case made by the bill, and admitted by the demurrer, is this: Hancock and one Barksdale owned together, equally, a body of land. Dodge, as a real estate broker (at least, in the particular instance), interviewed both, soliciting an agency to sell the lands. Barksdale agreed to take the sum of $14,000 for his half interest, and Hancock, for his half, agreed to take $15 per acre, and he furnished Dodge with the following writing: "Barksdale, Miss., Apr. 20th, 1903. Mr. H. C. Dodge, Fitzhugh, Miss.—Dear Sir: I will take fifteen dollars per acre for my part on our place, sections 21, 22, and 27, township 23, range 3 west. Yours truly, W. H. Hancock." The agreement between Dodge and Barksdale, not written, was that Dodge was to have, as commissions, all over $14,000 of what he sold Barksdale's interest for; and his agreement with Hancock, not written, was that he should have all over $15 per acre of the sale. Pursuant to this agency, Dodge effected a sale to one Chestnutt for a sum in excess of both the limits, and Barksdale promptly paid Dodge the overplus, as he had agreed to do; but Hancock declined to perform his oral agreement, and Dodge filed this bill.

The sale by the agent, Dodge, by consent of the parties, was for a certain sum in cash, and the balance in deferred payments

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bearing annual interest and secured by trust deed, with Dodge as trustee, and Barksdale and Hancock executed warranty conveyances to Chestnutt. This sale being thus assented to by Hancock, it does not lie in his mouth to object that his note above quoted meant for cash, and so this ground of demurrer, and that the suit of Dodge was premature because before full collection of the sale price, is not well taken.

We do not see that the statute of frauds, in reference to oral agreements for the sale of interests in land, has any bearing on this case, which is for the compensation of an agent to effect a sale of land.

If the position taken in the ninth ground of demurrer, that there is a remedy at law, was tenable, we cannot now reverse for that, because of sec. 147 of the constitution, the chancellor having taken jurisdiction. *Cazeneuve* v. *Curell,* 70 Miss., 521 (13 South., 545); *Adams* v. *Bank,* 74 Miss., 307 (20 South., 881); *Day* v. *Hartman,* 74 Miss., 489 (21 South., 302); *I. C. R. R. Co.* v. *Le Blanc,* 74 Miss., 650 (21 South., 760).

Affirmed, with sixty days to answer after mandate filed below.

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HARRISON JOHNSTON ET AL. v. COLUMBUS INSURANCE AND BANKING COMPANY.
EDWIN T. MOORE ET AL. v. SAME.
JOHN S. ROBERTSON ET AL. v. SAME.

THREE CASES.

FRAUDULENT CONVEYANCES. *Withholding deed from record. Agreement. Fictitious credit.*

The withholding from record of a deed:

(*a*) Is not fraudulent as against the creditors of the grantor where it results from mere inattention, indifference, or agreement, without fraudulent purpose to give the grantor a fictitious credit; but

(*b*) For a bank to withhold a deed to it from record by agreement with its president, the grantor, in order to give him a fictitious credit, is a fraud in fact as against the president's creditors who became such without notice of the deed, and the bank's claim thereunder will be postponed to the rights of such creditors.

FROM the chancery court of Lowndes county.

HON. JAMES F. MCCOOL, Chancellor.

Johnston and others, Moore and others, and Robertson and others, the respective appellants, were complainants, respectively, and the Columbus Insurance and Banking Company, the appellee in each case, was defendant in each of the cases, in the court below. From a decree in defendants' favor in each case, the complainants appealed to the supreme court.

The complainants in each of the suits were unsecured creditors of the estate of John M. Billups, deceased. The said Billups in his lifetime, and for about thirty years next before his death, was president of the defendant, and appellee, the Columbus Insurance and Banking Company. His estate proved to be hopelessly insolvent. The object of each of the suits was to have cancelled as fraudulent certain deeds executed November 5, 1894, by Billups to the bank and to subject the property which said

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deeds purported to convey to the bank to the payment of the complainants' debts. The facts are stated in the opinion of the court.

Orr & Harrison, and *McWillie & Thompson,* for appellants, Johnston *et al.;*

Linton D. Landrum, and *Green & Green,* for appellants, Moore *et al.;*

Betts & Sturdivant, and *Newman Cayce,* for appellants, Robertson *et al.*

On the 5th day of November, 1894, John M. Billups was the president of the Columbus Insurance and Banking Company, and was largely indebted to it. On that day he executed to the bank four instruments of writing, conveying to it all the property he owned in the world, including insurance on his life, and his future earnings as president of the bank.

Before said date Billups, the president of the bank, had for years been regarded as one of the rich men of the country, and evidently enjoyed the reputation. He lived sumptuously, and was esteemed by his neighbors as a financier of great ability.

In truth, however, at said time he was insolvent. Had all his assets been collected and applied to his debts, the proceeds would have fallen far short of paying his debts. His associates in the bank, one of whom, as a notary public, took the acknowledgments to the foregoing instruments, knew of no property owned by him when the deeds were executed which was not conveyed thereby.

President Billups, however, was unwilling for the world to be advised of his insolvency or of the true status of his financial affairs; he had too long enjoyed the reputation of being rich, and tasted its sweets, to be content to be numbered with the insolvent, and was unwilling to suffer the evils consequent of being known to be poor. He therefore requested the bank, the other officers of which were his personal friends and associates, and four out of six of them related to him or his family by consanguinity or

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affinity, not to put of record any of said instruments. Their record would have published his insolvency, his real financial status, and would thus have brought upon him the evils he desired to escape. We do not assert that President Billups had in mind the contraction of any particular debt which he did not hope to pay. Such a contention is not essential to the legal rights of our clients. It is manifest, however, that he did intend to preserve the reputation which he had previously enjoyed of being a wealthy and thoroughly solvent man, with all the incidental advantages of such a reputation in contracting debts. What did the bank do with this request? Why, it granted it; deposited all the instruments in its vaults, and there they remained, known only to the officers of the bank, until two days before President Billups died, and his death occurred August 11, 1902, *seven years, nine months, and six days* after the execution of the instruments. Two days before his death, and when he was known to be desperately ill, on his deathbed, the bank sent the deeds to the clerk of the chancery court, *with instructions to file and record them after the death of Billups.*

The officers of the bank tell us why the request of President Billups to withhold the instruments from record was granted by it. Harris, one of the directors, says in his testimony: "It was not recorded on account of Major Billups begging them not to do it for the present—a matter of pride with him more than anything else, I think. And his request was acceded to as a matter of personal consideration. That continued for fifteen months or longer; after I left there I do not know anything about it." Banks, the vice president of the bank, testified that the instruments were not recorded "at the request of Major Billups." Lee, the cashier of the bank, whose duty it was to see that instruments were recorded, testified that the instruments were not recorded at the request of President Billups and out of personal consideration to him, and that the request was renewed from time to time, and on each occasion was granted for personal consideration of Billups; and the same witness tells us that there

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was hesitancy on the part of the officers of the bank to have the instruments recorded at the time they were sent to the clerk with the instructions to file and record them upon the death of the grantor.

But to return to the date, November 5, 1894, of the execution of the instruments by President Billups to the bank. The bank at the same time agreed, for an asserted consideration of $900.80 (the exact sum to a cent of 8 per cent interest on the debts which it is pretended were paid by the execution of the deeds), to lease President Billups the plantation conveyed by the fee simple deed and all the personal property described in the bill of sale. This contract of lease seems to have been verbal, and it was renewed, as is claimed, from year to year as long as President Billups lived. The lands and personalty were assessed to President Billups at the time of the execution of the deeds and remained so assessed, although there were two or more new assessments, until Billups died in August, 1902. Billups paid the taxes himself to all appearances as if the property was his own, although in so doing he may have used the money of the bank. President Billups ran the plantation and sold the crops after the execution of the deeds just as he had done before. His transformation from a fee simple owner of the lands and the absolute owner of the personalty to a tenant and hirer was manifested only by the secret deeds on deposit in the vaults of the bank and the parol lease which was known only to himself and the bank's officers. In fact, the bank, as we are told by Cashier Lee in his testimony, paid no attention whatever to the personal property, worth $2,200, but allowed President Billups to do with it as he pleased. Think of Twyne's case, 3 Coke, 80; 1 Smith's Leading Cas., 33. President Billups, like Farmer Pierce in that celebrated case, conveyed to the bank everything he had in the world, so far as this record shows. Such self-denial is the cloak of fraud. President Billups, like Farmer Pierce, continued in possession, and by reason thereof traded and trafficked with others and deceived and defrauded them. The

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conveyances, too, like Farmer Pierce's, were made in secret—a very suspicious circumstance. But the point to it all is this: The world was kept in the dark about the whole transaction, and President Billups was enabled to and did maintain his reputation of being a wealthy, certainly a thoroughly solvent, man, when in truth he was poor and insolvent. He was enabled to and did obtain credit which would have been denied him had the true status of his financial affairs been known. These complainants and appellants at least were deceived and defrauded by him. President Billups was allowed for years to pose in the community as a thoroughly solvent man, when in fact he was insolvent, and thereby enabled to contract debts which he otherwise could not have done.

Let us see if the bank is responsible for this. We are fully aware of the decision of this court, in the case of *Day* v. *Goodbar*, 69 Miss., 687, wherein this court adjudged that the withholding of a deed from record does not render it fraudulent *per se* as to third persons, who, without notice of it, extend credit to the grantor, and we do not complain of said decision. Our case is easily, we think, distinguishable from that one.

In order to show the distinction, we will first inquire and state what the Goodbar case was. It was this: The chancellor there held that the simple withholding of the deed from record was a fraud *per se*. See last paragraph of the reporter's statement of the case, 69 Miss., 688. This being true, nothing else was before the supreme court than the question whether the simple failure to record a deed was fraudulent *per se,* because the court below had decided nothing else, and the appellants there had been denied a decision of any other question. There was in the case an averment in the bill of the creditors to the effect that the deed was withheld from record, and that it was so withheld by agreement with the grantor, but the answer denied that it was so withheld. There was some evidence tending to show an agreement that the deed should not be recorded (p. 688), but it fell short of establishing it. The chancellor did not decide that such

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an agreement was made. If, therefore, there can be tortured from the opinion in that case (something that cannot, we think, be reasonably done) the semblance of an idea that it is an authority for the proposition that an agreement to withhold a deed from record is not fraudulent, the utterances of that opinion, which look in that direction, are mere *obiter dicta,* and are not authority. We most heartily acquiesce in that decision; a mere failure to record is not a fraud *per se.* While the Goodbar case elaborates the question more than was done in the preceding case of *Klein* v. *Richardson,* 64 Miss., 41, yet the real decisions in the two cases are identically the same.

We come now to the case at bar. Appellants present a good deal more than a mere failure to record a deed. A failure to place a deed of record may result from mere negligence or forgetfulness; it may spring from an idea that the recording is useless, that the expenditure of the recording fee is unnecessary—in all of which cases the failure is not *per se* a fraud. But when it proceeds, in compliance with a request of the grantor and out of consideration for him, as in this case, and for his accommodation or gratification, even where the motive be, as was most likely the case here, to conceal from the world the true status of his financial affairs, then a very different question is presented from the one decided in the Klein case and the Goodbar case, not to mention in this connection several other things done by the bank, hereinafter mentioned, which had no counterparts in said cases.

Here the bank purposely, not merely negligently, withheld the deeds from record. This was done at the request of the grantor and out of consideration for him, for his accommodation or gratification. The result was that he was enabled to contract the debts due the complainants, which he could not otherwise have done. It enabled President Billups to pose as a wealthy and perfectly solvent man, when in truth he was poor and insolvent. The bank was itself unwilling for it to be known that its president was an insolvent.

In this case the bank purposely contributed to, and is there-

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fore responsible for, the creation of the condition of affairs which enabled President Billups to deceive and defraud complainants and appellants. This it did:

(*a*) By withholding the deeds from record at the grantor's request and for his accommodation and gratification.

(*b*) By permitting President Billups, under the guise of a lease, to manage and control the plantation and all the personal property belonging to it and the crops grown upon it, so far as the world could see, just as he had done before the deeds were executed, his transformation from an owner in fee to a mere tenant being a bank secret; and by permitting the lands and property to be assessed to Billups.

(*c*) And, in addition, the bank gave its financial and moral character certificate to Major Billups by retaining, reëlecting him, time and again, as its president, knowing that the very position—president of a bank—enabled him to pass in the community as a solvent and sagacious business man. Put all these things in contrast with the mere negligent failure to record a deed, and you have this case in contrast with the Goodbar and Klein cases.

The doctrine announced in the case of *Hilliard* v. *Cagle,* 46 Miss., 309, may have been too broadly stated, but that part of it which was correctly announced covers this case. The statement of Judge Campbell in the opinion of this court in the Goodbar case, 69 Miss., 690, to the effect that the cases cited by Judge Simrall, in the opinion in *Hilliard* v. *Cagle,* on the subject of equitable estoppel, have no place in a discussion of the registry laws or a question of fraud, is pure *obiter dictum*, and, with all due deference to the learned judge, is untrue, save only in those cases, like the Klein and Goodbar cases, where nothing more is shown than a mere failure to record an instrument. In cases like *Hilliard* v. *Cagle,* and this case, where the failure to record an instrument was an intentional one, adopted at the request and for the accommodation of the grantor, who was permitted by the grantee to pose before the world and obtain credit

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as the real owner of the property after, as before, the execution of the deed, it seems to us that the doctrine of equitable estoppel should be quite prominent in the discussion. But, however this may be, Judge Campbell tells us that the opinion in *Hilliard* v. *Cagle* is valuable (and therefore correct), "as showing a state of facts which led the court to the conclusion that the scheme there condemned was fraudulent as to subsequent creditors." Let us therefore see what that scheme was, and if there is not great similarity between it and the case at bar. Of course the scheme in the *Hilliard* v. *Cagle* case was not condemned because the mortgage was upon a stock of merchandise (that doctrine came into our law afterwards), because the court expressly decided that the deed was valid, and it had been decided valid in a previous case. See 46 Miss., 341, next to last paragraph on the page. What are the similarities between that case and this one? They are these, at least:

(*a*) There Baggett, the grantor, was largely indebted to Summers & Brannin, the vendees; here Billups, the grantor, was largely indebted to the bank, the grantee.

(*b*) There Baggett, the grantor, insisted that the deed should be withheld from the record for a time because it might impede and embarrass his business, and this was assented to by the grantees; here the grantor requested that the deeds should not be recorded at all. What for? The most charitable view than can be taken of it is to assume that it was to enable him to pose as a solvent man, when, in truth, he was insolvent. The bank knew that he had some purpose in making the request, and yet it lent its aid and consented to and did not record the deeds until after President Billups died, and the officers of the bank were unwilling to be instrumental in their record during his last illness, for fear of the consequences of doing so in case of his recovery.

(*c*) There Baggett was to continue in business; here Billups was to be continued as president of the bank, was to carry on his farming interest as before, and, necessarily, was to contract debts in so doing as well as in maintaining his palatial home.

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(*d*) There the testimony did not convince the court that an actual fraud was intended, and so in this case, if we concede that actual fraud was not intended, the cases are still parallel.

(*e*) There both parties believed the grantor solvent, while here it is incredible that both parties did not know that Billups was insolvent—a circumstance which makes this case stronger in favor of creditors than that one.

Assuming that no actual fraud was intended, the language of Judge Simrall, in *Hilliard* v. *Cagle,* is surely applicable: "If one is actually misled (said Judge Simrall) to his prejudice and loss by the conduct of another, the injury to him is just the same as though the thing were done for the very purpose of deceiving. Thus, too, if one maintains silence, when, in equity, he ought to speak or act, equity will debar him from speaking or acting when conscience enjoins silence. So, if by words or acts (and, we will add, a deliberate failure to act) another is fairly induced to believe in the existence of a certain state of facts, and acts on that belief, so as to alter his previous condition (as by advancing money or property), the former is concluded from averring a different state of facts as existing at the time."

Were not these complainants misled to their prejudice and loss by the conduct of the bank in agreeing to President Billups' request, for his accommodation, not to record the deeds, and in permitting him, to all intents and purposes so far as the world could see, to remain ostensibly the owner of the plantation and all the personalty thereon and to reap and dispose of the crops as he had done for years before the deeds were executed? Most certainly they were, if human testimony is to be believed; and when complainants testify that they would not have extended President Billups credit had they known of the execution of the deeds, they are not testifying to establish their claims against the estate of a decedent—there is no dispute about their debts—but they are testifying against the bank, and to establish their claims against it. No question as to the competency of complainants as witnesses was made in the court below. But to

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return to the application of the equitable principles mentioned. If appellants were so misled, it is no answer to them for the bank to say, "We intended no wrong." The bank is conclusively taken to have intended the natural and logical results of its acts.

Did not the bank maintain silence when in equity it ought to have spoken or acted? Ought it not to have refused to accommodate President Billups by acceding to his request to withhold the deeds from record, when it knew, and was bound to have known, that such withholding, coupled with his continuance to all appearances to be the owner, just as he was before the deeds were made, of the plantation and all the personalty thereon, to say nothing of his continuance in the presidency of the bank, was well calculated to and would perpetuate the public estimate in which he was held by the community as a thoroughly solvent man, and that he was thereby enabled to contract debts, while in truth he was insolvent?

Of course the bank had the abstract right to withhold the deeds from record, but when it intentionally did so, coupled with the other facts of this case, it cannot afterwards insist upon the deeds as valid instruments as against the deceived creditors of the grantor. The bank had the right to accommodate President Billups, but in permitting him to enjoy the benefits of the accommodation it assumed the burdens.

Did not the bank by its course of conduct induce appellants to believe in the existence of a certain state of facts—the ownership of all the property by President Billups—and act on that belief, so as to alter their previous condition, by loaning money to him and selling him merchandise? Most surely it did. Is not the bank now precluded from averring a different state of facts as existing at the time? Equity, justice, and common honesty, we think, demand that it should be.

It must be remembered all the time in the consideration of this case that appellants do not count alone on the registry statute (Code 1892, § 2457) as rendering void the conveyances to the bank; they count as well upon the statute of frauds (Code

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1892, § 4226) and the great common-law principle of which that statute is declaratory as condemning said deeds; and too much emphasis cannot be placed on the conduct of the bank, not alone in withholding the deeds from record, but in permitting President Billups to appear to the world, in connection with the affirmative declination to record the instruments, as the real owner of all the property, the plantation and personalty thereon, and the magnificent home in which he resided, not to mention the financial character certificate which was given him by his continuance as president of the bank. These things combined certainly make out a case of fraud. The intentional withholding of the deeds from record is but the keystone to the arch of an old-fashioned actual fraud.

J. A. P. Campbell, E. T. Sykes, Thos. J. O'Neill, and *Alexander & Alexander,* for appellee.

The bank did nothing to mislead anybody, nothing it did not have the right in law and morals to do. It had a large claim on its president, and adjusted it by taking a conveyance of property in payment of a large part of the debt and other property in trust as security for the remainder of the debt. It made no proclamation to the world of the transaction. It was not required to do so. It did not file for record the conveyances made to it. No law required it. By failing to do this it simply took the risk the law imposed for such failure—*i e.,* that a *bona fide purchase* might intervene or that some general creditor might acquire a lien before the bank should file for record its conveyances. It stands *rectus in curia,* because it violated no law by commission or omission. The vociferous cry of fraud will effect nothing until some specific act of wrongdoing by the bank can be pointed to. Not one has been named by counsel for appellants. Analysis of the charges made will fail to discover a single thing done or failed to be done by the bank violative of law. The addition or multiplication of ciphers produces only ciphers. The true ground of complaint is that the bank did not do; it was

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not active, but entirely passive. There was nothing unlawful in its deal with Billups. Surely there was no fraud in that. When and how did the transaction become tainted? Was it from renting the plantation and personalty on it which the bank had bought and paid for? Was it from withholding the conveyances from record? Was it from not causing a change to be made as to the assessment of the land for taxes? Was it because the instruments were withheld from record, at the request of Billups? Was the transaction, which was lawful in its inception, made fraudulent and void by the bank permitting Billups to use the $1,000 annual rental for three years to pay other creditors? Did the palatial home and luxurious style in which Billups lived infect the transaction with fraud? Did the fact that Banks, the vice president of the bank, knew that Billups owed him more than $25,000 constitute fraud? There is no germ of fraud in any of those things, and their combination cannot develop disease. The bank had the right as the owner to lease the plantation and personalty to Billups, and, if it permitted the rents to be used by him to pay others, surely it did no wrong to them. It had the right to withhold the conveyance from record and take the legal risk incident, and that it did this at the request of Billups made no change in the legal status. No matter what led to its action or nonaction, the question is not what caused it, but what was its legal effect. The palatial home and luxurious style in which Billups lived was not an element of fraud, nor was Banks' knowledge that Billups owed him a large sum, or the failure of the bank to have the assessment changed, since assessment rolls are not expositors of title. That the only purpose of the bank was to obtain payment of its debt and security therefor is manifest. That it is a bank, and not a private individual, so far from exciting prejudice, deserves commendation for its action to collect what was due it, in the interest of depositors and stockholders, for whom its officers were trustees and charged with a great responsibility. Billups was a man of the highest character, confided in by everybody and with good credit, and it is very

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doubtful if any in the community would have refused him credit, had all known of his deal with the bank. Had the deeds been recorded, it is improbable that the complainants would have had actual knowledge of what the law would have conclusively charged them with knowledge of. For some eight years Billups maintained his credit, and but for death would doubtless have continued to do so. That Billups died and precipitated a state of things that caused loss to the complainants did not convert a legal transaction into a fraudulent one. That an act of omission is hurtful to another does not constitute fraud. The act or failure to act must be one forbidden or required by law. Harm to another and violation of law must concur to constitute fraud. One may loan personalty to another who has possession and control for any period less than three years with no record or public notice of it. The possessor is thus invested with apparent ownership, and may obtain credit on the faith of it, but the real owner may maintain his title against any purchaser or even a creditor who has a lien, because this is the law. One may, retaining title, make a conditional sale of personalty putting the purchaser in possession and yet prevail in assertion of his secret title against any purchaser or confiding creditor who trusted to the apparent ownership. One may hire chattels from year to year indefinitely and not lose the right to them in favor of purchasers or creditors who deal with the hirer on the faith of his ownership from possession, because the three-year statute of frauds as to loans and reservations does not apply to hiring. 26 Miss., 275; 29 Ala., 188.

In like manner a man may withhold from record his absolute or conditional conveyances while the grantor obtains credit, and the only risk run is that the grantor may sell to an innocent purchaser for value or that some creditor of his may acquire a lien on the property. 64 Miss., 47; 69 Miss., 687.

No fraud is predicable of any of these transactions, because they are legal, and because of that a necessary element of fraud is lacking.

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Equity follows the law, and in neither is fraud imputable when there is no want of conformity to or transgression of any law. Jumbling together a string of assertions, even if all be true, none of which is a violation of any law, and calling it fraud because somebody was hurt by extending credit, cannot affect the validity of a perfectly legal course of action. You must put your finger on something the party has done which the law forbids or has failed to do which the law requires before you can convict him of fraud, no matter who may have suffered.

In several states of this union a conveyance of land, if lodged for record within one year of its execution, relates back to that date. The delay to record may result in serious harm to purchasers or creditors, but fraud is not predicable of it. If Billups had not made the conveyances until just before his death, or if, having been made as they were and surrendered to him for new ones, he had executed such, or if he had confessed judgment to the bank, the other creditors would have been remediless. How, then, can it be held that the instruments executed in 1894, and brought to light when they were, are any less effective than they would have been in the state of case supposed? In the cases put the "unfairness and hardship" to other creditors would have been just the same, and there would have been no semblance of fraud.

That Billups was president of the bank and a brother and some remote kin by affinity were directors is unimportant. His character as president was quite distinct from his relation as debtor, and the relationship of directors is worthless in the case.

The acknowledgment of the instruments before an "underling" of the bank, who was a duly authorized notary public, and the delivery of them to the proper custodian of the bank, were free from legal objection. To hold these to be badges of fraud would shock the business community and upset the everyday practice of banks and those who deal with them. Urging these things as ground of condemnation of the transaction is catching at straws made necessary because there is nothing more substantial to seize upon.

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There is nothing in the alleged non-delivery of the deed of trust or the ignorance of the trustee of its execution. It was delivered to the beneficiary, the usual course in such transactions. No formal acceptance by the trustee is necessary. He need not know of its existence. He may accept the trust at any time. *Omnis ratihibitio,* etc., applies. Jones on Mortgages, sec. 1780; Pingree Mort., sec. 1327.

The delivery of all the deeds to the bank was complete and perfect. They were formally parted with by the grantor, and placed forever beyond his control or right to recall. Strip this case of the sentimentalism in which it it enveloped by the fiery eloquence of counsel, and examine it by the light of legal principles, and there is nothing in the complaint of the action or non-action of the bank.

Examination of the numerous cases cited for appellants will show either a widely different state of facts in each from that presented by this or a different statute from ours or a different view of the law from that established in this state.

It will not do to try this case by the rules applicable to preferential assignments, which are governed by rules peculiar to them.

It will not be safe to be guided by the opinion in *Hilliard* v. *Cagle,* 46 Miss., 309, which, besides the criticism of this court in 64 Miss., 67, and 69 *Ib.,* 687, has received the condemnation of the supreme court of Alabama in this language—viz.: "The case of *Hilliard* v. *Cagle,* 46 Miss., 309, seems to go to the extent of creating an estoppel in favor of creditors generally without any actual fraud being imputed to the mortgagee in withholding his mortgage from registration. This view is contrary to the spirit of our registration statute, and does not seem to us to be based on sound reasoning. It affords protection to those not intended to be protected by the statute—to other than subsequent purchasers for value, mortgagees, and judgment creditors." 87 Ala., p. 745. This case cites with approval the case in 105 U. S., 100, because of the gross fraud committed by the mortgagee,

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Brief for appellee.

who, with an unrecorded mortgage, made false representations to the effect that the mortgagor had large property unincumbered and good credit, on the faith of which false representations he obtained large advances. Of course on this ground the case in 105 U. S., 100, was rightly decided, not because of the withholding of the mortgage from record, but because of the actual fraud committed by false representations. There was a proper application of the equitable doctrine of estoppel, but it has no place, in the absence of actual fraud, in considering the effect of non-degistration. We confess inability to understand the talk about *active* concealment. We do not know what that is. Failure to record is not active, but passive. It is not doing, but failing to do, and how nonaction can be characterized as *active* is incomprehensible by us. It is a catching phrase intended to give some effect not warranted to the mere fact of non-registration. The passiveness of the mortgagee in not recording made his activity in falsely representing the financial condition of the mortgagor, a fraud whereby the party acting on the false representations was induced to extend large credit. The opinion in that case is very much labored, and might well have been very much shorter, and thereby better. It cites and approves *Hilliard* v. *Cagle,* 46 Miss., 309, the writer, no doubt captivated by the fine phrases inappropriately used in the opinion in that case —sound maxims, but having no place in the discussion in that case.

If the law condemns a transaction, there is no need for the doctrine of estoppel; and if the law allows what is done, estoppel is not predicable of it. Equitable estoppel belongs to a very different class of cases, and performs its beneficent work in other cases than the operation of the registration laws. Search Herman and Bigelow on Estoppel, and this will be confirmed.

Hilliard v. *Cagle* was decided mainly on the case in 2 Maryland Ch., and it was decided on a statute which made a mortgage of personalty, which was the subject of the mortgage, void, if not recorded—a very different case from ours. Wait on

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Brief for appellee.

Fraud. Con., quoting from the opinion in 105 U. S., 100, adds: "But there must be some evidence of a preconcerted and contrived purpose to deceive and defraud the other creditors of the mortgagor, of which scheme the withholding of the instrument from the record constitutes a part." P. 332, sec. 235, 2d ed. of Wait.

Nearly one hundred years ago it was settled in Virginia, whence we derived our registration laws, that the creditors meant to be protected by this statute are *lien* creditors. And more than half a century ago it was so announced in this state, and has been maintained ever since. 2 Tucker's Com., 379; 6 Rand., 185; 3 Hen. & Musr., 352; 9 Wheat., 485. See 2 Bibb., 420; 4 Dana, 252; 10 Leigh, 499.

The decisions of courts whose statutes are different from ours, or are differently interpreted, or where the common law is differently declared, are only misleading and not helpful to correct solutions of questions under our statutes.

"Mere failure to record a mortgage is not a ground for setting it aside for the benefit of subsequent creditors who have acquired no specific lien on the property described in the mortgage." Herman on Estoppel, 923; Bump. Fraud. Con., 38-40; 87 Ala., 736, p. 742; 77 Ala., 184, 189; and numerous other citations might be made, but it is useless. Even 105 U. S., 100, the quiver which furnished most of the arrows of counsel for complainants, distinctly announces the same doctrine.

Mere delay in the delivery of possession (of chattels) is ordinarily not considered fraudulent as to creditors as long as delivery is actually made before attachment. Until the attachment the debtor has done nothing to the injury of the creditor on which to claim a voidance of the sale." Tiedman Equity, citing 53 Conn., 401, and many other cases. "A deed not fraudulent in its inception could not become so by a matter subsequent. If a deed of trust be fairly executed to secure a just debt, it cannot be impeached for fraud for any matter *ex post facto.*" 6 Randolph (Va.), 306; Bump. Fraud. Con., 157.

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Brief for appellee.

Proof of *bona fide* hiring or lease will, as a general rule, repel the presumption of fraud. 55 Ala., 282, 300, citing a number of cases.

Hiring slaves from year to year is not within the three-year statute of frauds. 28 Ala., 188; 26 Miss., 275. Hiring slaves was, from 1840 to 1846.

Possession of land is not even presumptive evidence of ownership or fraud. Bump. on Fraud. Con., 122.

The death of Billups, the grantor and mortgagor, did not prevent the recording of the instruments or change in any way the rights of parties. Jones on Mort., sec. 509, and cases cited.

The creditor has no lien on the estate of the decedent and *a fortiori* no claim on the property conveyed or mortgaged to another. He has a claim on what belonged to the decedent, and which would go to the heir or legatee or devisee, not on what the decedent if alive could not claim. Pingree on Mort., sec. 725; Jones, sec. 509.

No one can read the record of the action of the bank in this transaction and reach any other conclusion than that its sole object was to guard the interests committed to it by securing the large debt due it from Billups, who was its president, and, having faith in him—as everybody had who knew him—indulged him for years, and aided him as far as it could by *passiveness* to work out of debt, if he could, and it is an unjust and cruel charge to make that it was guilty of actual intent to defraud his other creditors. If mere indulgence by a creditor constitutes fraud, the bank was guilty; otherwise not, for it did nothing to induce any person to credit Billups. If its purpose had been to defraud his existing creditors, that would not avail subsequent creditors, which complainants are. Code, § 4228; 46 Miss., 309; 54 Miss., 746; 4 Smed. & M., 309; 60 Miss., 886; 106 U. S., 260, quoting and approving 59 Mo., 159. Can it be believed that the conveyances in 1894 were intended to deceive and defraud creditors in 1902?

Billups, besides being president of the bank, with a salary of

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$900, and $500 for managing the plantation of the bank, was engaged in business supposed to be very profitable, and he rented several plantations and made several hundred bales of cotton, and for years paid his debts and maintained his credit; and unless this court is willing to overturn the settled law of this state, it must say the bank did nothing it had not the right to do, and affirm the decree.

The court will find 55 Ala., 282—292, a most valuable case elucidating every principle applicable to this; also 50 Ala., 590, and 40 Ala., 259—269, will be found helpful.

Argued orally by *Marcellus Green, J. I. Sturdivant, R. H. Thompson,* and *J. A. Orr,* for appellants; and by *C. H. Alexander, J. A. P. Campbell,* and *E. T. Sykes,* for the appellee.

CALHOON, J., delivered the opinion of the court.

These three cases, though differing in some respects as to the pleadings, all rest substantially on identical facts, and since the result in each case must turn upon a pure question of fact, and that the same question of fact, one opinion will apply to all. There is no dispute in reality between the parties as to the law governing the cases. It is, of course, clear that a mere withholding of the instruments in this case from record, unattended by any other circumstances, would not be a fraud. Instruments may be withheld from record as the result of mere inattention, indifference, or mere agreement to withhold, without fraudulent purpose. In such case the only penalty the law visits upon the party so withholding is the risk that some other lien creditor may record his lien in the meanwhile, and so obtain priority over the instruments withheld from record. But if the evidence goes beyond this, and clearly and convincingly, as it must always do in cases of actual fraud, shows that the withholding from record was the result of an agreement so to do between the grantor and grantee, and, further, that the instruments were to be so withheld with the intent on the part of the grantor and

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grantee that knowledge of such instruments should be withheld from the public, so as to give the grantor a fictitious credit, enabling him to obtain credit from others trusting him on the faith of his supposed ownership of the property conveyed in the instruments, then such facts make a case of actual fraud. In the Klein case, 64 Miss., 41 (8 South., 204), the court found that Mrs. Klein simply trusted, as a wife and mother usually does, to her husband and her son, and had no knowledge of the facts connected with the business in any way; that she did not know that a conveyance in that case ought to be recorded, and was wholly in ignorance of any agreement that it should not be recorded. In the case of *Day* v. *Goodbar,* 69 Miss., 687 (12 South., 30), it appeared that one of the members of a mercantile firm executed a mortgage, not on firm property, but on about one-third only of the individual property of one member of the firm, and the proof failed to show sufficiently that there was any agreement to withhold the instruments from record. So far as these two cases are concerned, therefore, it is obvious that there was no actual fraud. The case of *Hilliard* v. *Cagle,* 46 Miss., 309, is also manifestly a case based on actual fraud, although an unfortunate expression in the first part of the opinion would seem to indicate that the court thought it was a case of constructive, and not actual, fraud. The facts of the case, however, plainly show actual fraud, as pointed out in *Klein* v. *Richardson* and *Day* v. *Goodbar, supra.*

What are the facts of this particular case? J. M. Billups, on November 5, 1894, was president of the Columbus Insurance and Banking Company, and had been for thirty years theretofore, and he remained president to the date of his death, August 11, 1902. On November 5, 1894, he executed a deed and bill of sale and a trust deed to said bank, which conveyed all his known visible property, to secure an indebtedness due said bank of some $30,000. It is perfectly clear that he was insolvent at the time, and that this insolvency was well known to the bank. All these instruments were acknowledged before C. H. Ayres, who was a

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notary public, and also the teller of the bank. The trustee in the deed of trust was a director in the bank, and a majority of the directors were related to Billups either by consanguinity or affinity. It is impossible to escape the conclusion from the testimony that there was an agreement between the bank and Billups that these instruments should be withheld from record. Semi-annually, for eight years, the question of whether the deed and deed of trust should be recorded was discussed by the directors, and on each occasion the conclusion was still to keep them from record. They were so continuously withheld from record from the date of execution until 50 minutes after 4 o'clock P.M. on August 11, 1902, when they were filed for record, such filing occurring only a few minutes after the death of Billups, the chancery clerk having had the papers handed to him by a brother of Billups a few days before Billups' death, with instructions not to file them for record until after his death. At the time (November 5, 1894) of the execution of these instruments J. M. Billups was individually indebted to the appellee bank in the sum of $27,000, and after the execution of these instruments in part payment of said indebtedness, he still owed the appellee about $16,000, which was that day evidenced by two notes—one for $10,712.51, secured by sixty shares of bank stock, of the par value of $6,000, and a paid-up policy of life insurance for $5,070, payable and absolutely assigned to the appellee, and one note for $5,000, secured by a deed of trust on Billups' homestead, in Columbus, Miss. As additional security for these two notes, it was agreed that Billups' salary as president and the dividends on said sixty shares of bank stock should be applied on December 31st of each and every year to the payment of the two notes, and they were so applied. On that same day—November 5, 1894—as a part of the same transaction, a statement of the indebtedness of Billups & Banks, cotton commission merchants, composed of Billups and Col. Banks, was made to the appellee by the cashier of the appellee bank. This statement showed that the firm of Billups & Banks

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acquired a credit of some $34,000, which was that day secured to the bank by two notes, of some $17,000 each, payable in one and two years from date, the notes being executed by Billups and Banks as individuals, and not as a firm. After the payment of said firm indebtedness on November 5, 1894, by Billups, of some $7,000, he was then indebted to Billups & Banks in the sum of about $9,000. So that, to summarize, on November 5, 1894, Maj. Billups stripped himself of all his property by these instruments, and owed the following amounts, approximately: $16,000 on his individual account to the bank; $34,000 on the indebtedness of Billups & Banks to the bank; $9,000 to Billups & Banks, Billups having assigned as security for this an insurance policy for $5,000. This statement, fully proved by the evidence, makes out a total indebtedness on November 5, 1894, on the part of Billups, of about $59,000, or, if it be said that he owed only half of the firm debt of Billups & Banks, of about $42,000. Billups was insolvent on said date, and remained so until the day of his death, and Banks paid the bank the whole of the indebtedness due by Billups & Banks. These instruments were kept in the vault of the bank for the entire eight years, but were put promptly to record within a few minutes after Billups' death, having been sent to the clerk some forty-eight hours before his death, with instructions not to record until after his death. It is clear that an agreement was made between Billups and the directory of the bank so to withhold these instruments from record; the directory, according to some of the witnesses, doing so reluctantly, at Billups' earnest insistence. It further appears that, from the time of the execution of these instruments until the death of Billups, all the property conveyed to the bank remained assessed to Billups for state and county taxes, and that these taxes were actually paid by Billups as an individual, although it also appears that the bank reimbursed him for the taxes so paid. It further appears, from the deposition of Armstrong, tax collector, that Billups paid the taxes on the plantation and personal property and his dwelling

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house (all this property being embraced in one receipt) by his individual check, and the taxes on the other real estate owned by the bank and managed by Billups by giving his check as president of the bank, the tax receipts for 1900 and 1901 showing that the payments of taxes on the other lands of the bank and on this land were made several days apart. It further appears that all of the personal property on the plantation, consumable in its use, of the value of about $2,200, was dealt with by Billups as if it were his own, in all respects—a large part of it being used up—and that Billups retained possession of all said lands conveyed by him to the said bank, controlling and exercising dominion over them, from the time of the execution of the instruments to the day of his death, just as if he were owner. It does appear, however, further, that there was a renting of some kind by the bank to Billups for the year 1902, for $900.80, of the plantation. This $900.80 would seem to be the exact amount, to a cent, which 8 per cent per annum on the purchase price of the plantation, $9,060, added to the purchase price of the personal property, $2,200 ($11,260 in all), would make. The personal property consisted of twenty-two mules, five wagons, one gin, one press, one mower and rake, one yoke of oxen, ten cows and calves, forty head of hogs, twelve double plows, twenty-two sets of plow gear, twenty-eight sweeps, and fifteen single plows. But Billups was allowed to control all said personalty as if it were his own. At his death there were only three or four mules found on the plantation. This rent of $900.80 for the land remained the same from 1895 to Billups' death, no effort being made by the bank to rent to any other party. But the year after his death the same plantation, without the $2,200 of personal property, was rented for $1,100. The control and possession of all this property—farm and personalty—was open to the inspection of every one; and it is abundantly shown by the testimony that all persons in the neighborhood of the farm, including one Hines, who had been for seven years manager of the home plantation, supposed all the

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time that Billups owned the plantation, and never knew anything to the contrary until after his death. It further appears that Billups gave Walker a note for $638, securing it by note reciting twenty-three bales of cotton "made on my plantation in the Trinity neighborhood," and one to Wood for $500, reciting that it was secured by seventeen bales of cotton grown on "my home place." This property had been conveyed before these notes were made. The evidence makes it too clear for disputation that Billups was believed by all the public to be, after the execution of these instruments to the bank, just as completely owner of the property conveyed by him to the bank as he had been before their execution. And it further appears satisfactorily that the creditors in these three suits extended credit to Billups upon the faith of his ownership of this property, and that, if they had known that he was not the owner, no credit would have been extended. We think the clear result of the testimony is, further, that the bank knew, and was bound to have known, that Billups was contracting debts all the while after the execution of these instruments until his death. It appears, for example, that in 1898 and 1899 the notes he gave the bank were secured by collateral, and that this collateral was so many bales of cotton to be raised, but that, as he did not make enough to satisfy outside parties who had claims on the crop, the bank waived its claim on that cotton and held those notes without any security whatever. It also appears that large checks were sometimes drawn on the bank by Billups, the cashier, however, stating that he only remembered the parties to whom payable in one or two instances—especially mentioning two checks to Robertson & Co. in January, 1902. Col. Banks, vice president and director of the bank, testified that a major part of the planters in that section did business on a credit, and that he did not know whether the bank knew that Billups was farming on credit, but supposed it did. During all these eight years, from November 5, 1894, Billups, until his death, engaged in large farming operations, renting his home place from the bank and other

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land from three or four parties near this place. He was the senior member of the old firm of Billups & Banks, commission merchants, from 1892 until January 16, 1900. Billups was about seventy years of age when he executed these instruments.

It is hard to understand why, if there was no agreement not to record the instruments, as is stoutly urged, the bank should have been so thoroughly dominated by Billups while he lived and should put them so instantly to record upon his death. The existence of these instruments was kept from the knowledge of all persons except the parties thereto, and perhaps one or two members of Billups' family. It is also impossible to understand how, if, as contended by the bank, it did not know that Billups was contracting any other debts, it should have been so anxious to record the instruments as soon as he was dead. If it was unnecessary to record them during his life, when he might have contracted future debts, if the bank was satisfied that he owed none, then why, after he was dead and could not possibly contract any more debts, should the bank rush the papers to record? It is asked very earnestly, What advantage was there to accrue to the bank from withholding these instruments from record? It seems to us the answer is plain and perfect. If the public had known the true situation on the 5th of November, 1894—that this bank had as its president a man who had at the close of that day stripped himself of every particle of property, and who was hopelessly insolvent, and who still owed the large sums we have referred to, to the bank, after all credits had been applied, and that the bank had allowed this president in the past to so largely overdraw, and proposed for the future to keep secret the true situation as to his ownership of the property he had theretofore owned—is it not perfectly obvious that confidence in the bank itself would have been seriously shaken, if not destroyed, and its own credit thereby impaired or taken away? Surely no elaboration is needed to make this plain. It might very well be that the bank wished no breach with its president, no resort to courts for the collection of its debts, no

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disclosure to the public of the methods of dealing between it and its president or of the fact that the president and vice president owed the bank nearly $70,000, since such knowledge might well have tended to shake the confidence of the public in the safety and saneness of the bank's management. Such considerations would be very material in inducing the action of the bank in concealing these instruments from the knowledge of the public.

We have given this case the most careful, painstaking, and protracted examination, and we are constrained by the inexorable facts of the case to hold that the case here made, as above set out, is one of actual fraud. If actual fraud could only be made out by declaration of the parties to a scheme which the law condemns, there would be few cases indeed in which the arm of the law could reach and uncover it, letting in the light of day; for all such schemes are, from their very nature, surrounded with secrecy, and the actors therein ought not to be expected to proclaim themselves amenable to the law's condemnation. Courts must always look to the dealings and conduct of the parties, rather than to any declaration they may make, as to the fraud, or not, of the transaction assailed. The view which we have taken is abundantly supported by authority. It is supported by *Hilliard* v. *Cagle,* 46 Miss., 309, cited with approval in *Blennerhassett* v. *Sherman,* 105 U. S., 100 (26 L. ed., 1080); by the Sherman-Blennerhassett case itself, and numerous authorities therein reviewed; by *Mobile Sav. Bank* v. *McDonnell,* 87 Ala., 736 (6 South. Rep., 703); by *Lehman, Durr & Co.* v. *Van Winkle* (Ala.), 8 South. Rep., 870; by *Central Nat. Bank* v. *Doran,* 109 Mo., 40 (18 S. W., 836); by *Walton* v. *First State Bank* (Colo. Sup.), 22 Pac., 440 (5 L. R. A., 765; 16 Am. St. Rep., 200); by *Clayton* v. *Exchange Bank,* 121 Fed. Rep., 630 (57 C. C. A., 656); and by the authorities cited at p. 113, vol. 24, Am. & Eng. Ency. Law (2d ed.), which have been accurately analyzed by learned counsel for the appellant (*Rice* v. *Wood,* 31 L. R. A., 638, note N).

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We do not think the doctrine has anywhere been more accurately expressed than by that great judge, Chief Justice McClellan, in *Lehman, Durr & Co.* v. *Van Winkle,* decided in 1891, *supra;* and we approve that statement of the doctrine, which is as follows: "Had there been no understanding looking to the concealment of the mortgage by keeping it from the records—no purpose so to do, to the end of bolstering up Belzer & Parker's credit—but only an unintentional omission to record it, of course the only effect of not recording it would be to postpone it to after-acquired liens. But as here alleged, the failure to record it is not mere omission, attributable to inadvertence, inconvenience, or negligence, but is an affirmative and intentional withholding from record, with the ulterior purpose charged in the bill, and we cannot be in doubt that the transaction is tainted with actual fraud, which will vitiate it as against subsequent creditors and the like, who have been drawn into contractual relations with the mortgagors by assuming their apparent to be their real status with respect to the property covered by the mortgage; and this result follows notwithstanding the conveyance is free from infirmity in every other respect. *Blennerhassett* v. *Sherman,* 105 U. S., 100 (25 L. ed., 1080), and numerous cases there cited and quoted; *Bank* v. *McDonnell,* 87 Ala., 736 (6 South. Rep., 703)." In all these cases of actual fraud, the principle on which the party holding the mortgage or deed of conveyance is postponed, and the defrauded creditors let in, to be first paid out of the avails of the property mortgaged or conveyed, is, as well said in the citation from the Am. & Eng. Ency. Law, *supra,* that such defrauded creditors are not required to have secured a lien before such instruments have been actually recorded, but that their claim for relief is based on fraud, and not on the protection of the recording acts; and it will be specially noted in the case at bar that we are dealing, so far as the plantation is concerned, with the case of an absolute deed, where the vendor was left in possession, contrary to the essential nature and terms of the conveyance, and not with

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a mortgage, where continued possession by the mortgagor for a reasonable length of time would be consistent with the nature of the security, as pointed out in *Mobile Sav. Bank* v. *McDonnell, supra.*

It follows from these views that the decree in each of these cases is reversed, and the cause remanded to be proceeded with in accordance with this opinion; the complainants being entitled to have their claims first paid out of the property, except legal homestead, conveyed by said Billups to the bank.

JOHN HARVEY THOMPSON, TRUSTEE, v. FIRST NATIONAL BANK.

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1. **PARTIES.** ***Right to sue in representative capacity. Denial. Code*** **1892, § 1797.**

    A denial in an unsworn answer that the complainant, suing as trustee in bankruptcy, was legally appointed trustee, does not require the complainant to prove his appointment, under Code 1892, § 1797, relieving parties suing in a representative capacity from proving the character in which they sue, unless such character is specially denied under oath; nor will defendant in such case be permitted to predicate a defense of evidence negativing complainant's character.

2. **SUPREME COURT PRACTICE.**

    Where a suit was erroneously dismissed in the court below solely on the ground that plaintiff was not entitled to sue in the representative capacity in which he brought the suit, the supreme court will not affirm on the ground that the result was correct on the merits.

FROM the chancery court of, first district, Hinds county.

HON. ROBERT B. MAYES, Chancellor.

Thompson, the appellant, suing as trustee in bankruptcy, was the complainant, and the First National Bank, appellee, defendant in the court below. From a decree in defendant's favor

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the complainant appealed to the supreme court. The opinion sufficiently states the facts. [The case was heretofore in the supreme court, and is reported—*Thompson* v. *First National Bank,* 84 Miss., 54.]

Watkins & Easterling, and *Brame & Brame,* for appellant.

Was the representative character of Thompson, trustee of the estate of R. S. Barman, bankrupt, put in issue by the pleadings in this case? It is denied in the answer that Thompson is the trustee of the estate of R. S. Barman, but the answer is not sworn to. The oath of Carter, president of the bank, is confined to the matters of discovery contained in his answer.

The representative capacity of Thompson, trustee, was admitted, his character not having been denied under oath, as provided in § 1797, Code 1892; and to that end we invite the court to a review of the decisions of this tribunal upon that statute, a statute which appears to have been in our code in more or less varied forms for nearly three-quarters of a century. *Woolen Mills* v. *Rollins,* 75 Miss., 253; *Reed* v. *Railroad Co.,* 4 How., (Miss.), 262; *Vicksburg, etc., Co.* v. *Washington,* 9 Smed. & M., 536; *Hemphill* v. *Bank of Alabama,* 6 Smed. & M., 48; *Moore* v. *Anderson,* 3 Smed. & M., 324; *Beard* v. *Griffin,* 10 Smed. & M., 589; *Anderson* v. *Leyland,* 46 Miss., 295; *Hope* v. *Hurt,* 59 Miss., 178; *Moore* v. *Knox,* 46 Miss., 602; *Railroad Co.* v. *Anderson,* 51 Miss., 830.

We have now given the court every case in our books bearing upon this statute, and we give the following as being in our judgment the law arising from the statute and the adjudications thereunder: That a bill to which a single answer of denial is filed puts in issue every right of the complainant to recover except his representative capacity; and if this would be put in issue, his representative capacity must be denied under oath. It is true that the complainant must have title, but if he sues in a representative capacity, and the only thing which the court

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finds which would prevent his title in such capacity from being perfect is some defect in his qualification of appointment to such capacity, then he is vested with title unless his representative capacity is denied under oath. In other words, the crucial test is this: Does the complainant's failure to get title result from a failure on his part to do all those acts or have done all those acts necessary to clothe him with his representative capacity? If that is true, and his representative capacity is not denied under oath, it is then admitted; and that being the only thing which prevents him from becoming vested with title to the chose in action (that being admitted), it follows as a matter of course that he did acquire title to the asset in question.

The appellees, however, recognizing that the chancellor's opinion in holding that the answer was sworn to for all purposes is perfectly untenable, have completely abandoned it, and now say that, the whole record being before the chancellor, if it appeared from the whole record that Thompson was not the trustee, then Thompson got no title to the chose in action in question. Now let us examine that just a minute.

Thompson was either the trustee or he was not the trustee of the estate of R. S. Barman. If he was trustee, of necessity there had been a valid adjudication, and all steps preceding his appointment were valid. In other words, the admission of his representative capacity carried with it the admission of all steps leading to his qualification as such trustee. If he was the trustee and is the trustee, he is clothed with title to the assets and is entitled to bring the suit, and, under the chancellor's opinion, is entitled to recover.

We respectfully submit that the chancellor having decided that Thompson, trustee, would have been entitled to recover had he been properly appointed trustee, and it being admitted that he was the trustee, the chancellor was wrong in dismissing the bill, although without prejudice, and, being wrong upon that point, this court should enter a decree for the complainant.

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Green & Green, for appellee.

There was no jurisdiction in the district court of the United States to adjudge Barman an involuntary bankrupt, and the attempt so to do was void.

Under the uniform rule there must be jurisdiction in the court to render the judgment; it must have jurisdiction of the person and the thing. We admit that this court had ample powers in bankruptcy in a proper case, but before it could exercise the same, it was essential to acquire jurisdiction over the person of the alleged bankrupt, and until and unless it did, its adjudications were void, and could be disregarded at pleasure whenever and wherever they came into question. *Whitney* v. *Bank,* 71 Miss., 1017; *Davis* v. *Cass,* 72 Miss., 985; *Swain* v. *Gilder,* 61 Miss., 667; *Stampley* v. *King,* 51 Miss., 728.

It was contended that because this was the judgment of the federal court it could not be attacked collaterally. This arises from a misconception of our position. There is no difference arising from the fact that the judgment was in the federal court. There is neither kind nor degrees in voidness; they are all on a par; one is as void as the other; and the mere fact that this is a void federal court judgment confers no special rights on those claiming under it. All such bind no one, and are conclusive of nothing. This very question was made in the case of *McPike* v. *Wells,* 54 Miss., 136, and there conclusively settled in favor of the appellee.

Admitting that there was error in the decree of the chancellor in holding that Thompson had no title, still on the merits the right result was reached, and the decree should be affirmed, as the whole case is now before this court.

As held in *Adams* v. *R. R. Co.,* 81 Miss., 90: "On appeal the appellant is restricted to an examination of the errors contained in the assignment of errors. No such restriction rests on the appellee, the distinction being between a party seeking to reverse a judgment and a party resisting the attempt." See also *Thompson* v. *Bank,* 84 Miss., 54 (s.c., 36 South. Rep., 65).

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Under the law of this case it was essential for the appellant to show, by a preponderance of the evidence, that the transfer complained of was made by Barman with intent to give the bank a preference over the other creditors of the same class, and that the bank had reasonable cause to believe it was given with such intent, and that Barman was insolvent, and that the amount that the bank received was a greater per cent than that which the other creditors in the same class would have received. The appellant failed to make this proof: (1) No proof that Carter, who conducted this whole transaction, had any reasonable cause to believe that a preference was intended to be given. (2) There was no preference in that there was no proof that the makers of the firm note were insolvent and that their creditors would not receive the same amount as other creditors in the same class with the bank.

*MAYES, S. J., delivered the opinion of the court.

This case was heard in the chancery court on the pleadings and the evidence. In the course of the trial the bank, the defendant below, offered in evidence the files of the United States district court in the matter of the bankruptcy of R. S. Barman for the purpose of showing that, because of certain defects in that proceeding, the complainant was not in fact trustee of Barman's estate, his appointment being alleged to be void. The appellant objected to the introduction of those files, for the reason that no plea or answer had been made in the cause, specially denying, under oath, his character as such trustee, as required by § 1797, Code 1892. The court, however, allowed the record to be introduced, and, holding that the appointment of the appellant as trustee was void, dismissed the bill. The material language of the decree is as follows: "It appearing to the court that said complainant herein has no right or title to maintain this cause, and no title to the debt sued for herein, and that this cause should be dismissed on this ground alone,

* Judge Calhoon, being disqualified in this case, recused himself, and Edward Mayes, Esq., a member of the Supreme Court bar, was appointed and presided in his place.

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and without prejudice to the right of any subsequent trustee of R. S. Barman to sue," it was therefore decreed that "said cause be, and the same is hereby, dismissed on the ground that said complainant has no right to maintain the same, and has no title to the debt sued for herein and hereby sought to be recovered, but without prejudice to the right of any subsequent trustee of said R. S. Barman to sue therefor." The appellee maintains that the statute was complied with. The answer does explicitly allege that the appointment of appellant as trustee by the bankrupt court was without jurisdiction and void, and denies that he is trustee; but the affidavit to the answer was made by S. S. Carter, president of the bank, and the material part of it runs as follows: That he is "the proper person, as well as duly authorized, to swear to the discovery given in answer to the interrogatories contained in said bill, and, further, that the matters stated in said discovery as of his knowledge are true of his own personal knowledge, and those things stated on information and belief in said discovery he personally believes to be true upon his own personal information and belief." It will thus be seen that the affidavit to this answer is by its terms carefully restricted to those allegations which are made in response to the prayers for discovery. It is not an affidavit averring the truth of all of the allegations contained in the answer; much less is it an affidavit which specially challenges the character in which the plaintiff sues. Such an issue is studiously excluded by the language of the affidavit, because the representative character of the plaintiff, as set forth in the bill, is clearly not of those matters of discovery sought by the bill. The statute provides that it shall not be necessary in "any case" to prove the description of character set forth in the pleadings, unless the same be specially denied by plea verified by oath. This statute is not met unless the pleadings are in such shape that the description of character is specially challenged under oath. In *Thornton* v. *Alliston*, 12 Smed. & M., 124, it was held that a plea of *non assumpsit*, sworn to generally, was not sufficient to raise an issue under

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this statute, and the court said: "It is apparent that the intention of the statute—especially that of 1836—was to require from the defendant a specification of the nature of the proof required from the plaintiff, whether as to the execution of the writing, its signature, or the description of character to be denied upon the trial." In this case the affidavit is not even broad enough to cover the averments of the answer generally, but it is carefully restricted to certain features of the answer, which do not present an issue as to the complainant's representative character.

The appellee claims further that even if the affidavit was not sufficient under the statute, the decree of the court below was still correct, and for the reason that the defendant assumed the burden of proof, and affirmatively showed by the record of the bankrupt court that the complainant was not trustee. It is contended that the decree rendered was not because of the failure of the complainant to prove his trusteeship in the first instance, but because of the fact that defendant disproved it. In short, the contention is that the effect of the statute is merely to change the burden of proof. But we consider the statute to have a broader effect. In its essential substance it is one about pleadings. Its declaration is that "it shall not be necessary in any case to prove . . . the description of character . . . which may be set forth in the pleadings, unless the same be specially denied by plea, verified by oath." If in the trial of a cause the defendant is allowed, merely by assuming the burden of proof and making out a *prima facie* case of non-existence of the description of character, to impose on the plaintiff or complainant an adverse judgment unless he meets that *prima facie* case by showing the existence of the representative character, then a case has occurred in which the plaintiff is put upon the proof of such a description of character, and it is done in the absence of a "special" denial by plea verified by oath. The use of the word "specially" in the law cannot be ignored, or its observance avoided. The statute declares that he shall not be

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called upon to make such proof "in any case," except by a special denial under oath. If the practice claimed here were permissible, the plaintiff is exposed to be unduly surprised, or else he must be prepared for such tactics; and the wise and salutary provision of the statute would be, to a great extent, defeated. The representative character of the complainant is not put in issue, except in the manner prescribed by the statute, and, not being put in issue, the defendant cannot assail it.

We do not overlook the suggestion of the appellee that, although the court below may have erred in the matters considered above, yet still the general result of the decree was correct, because, as contended, the whole case was before the court, and the appellee was entitled to a decree on the merits, and that for this reason the decree should be affirmed. We do not, however, as to this case, adopt that view. To do so would be, in effect, to exercise an original, and not an appellate, jurisdiction. The decree, as quoted above, expressly provides that the dismissal is only because the plaintiff had no title, because of his want of representative character, and it expressly reserved the right to sue without prejudice by any trustee appointed. It cannot be said, therefore, that this was in any proper sense a decree on the merits. In *Railroad Co.* v. *Adams,* 81 Miss., 90 (32 South. Rep., 937), it was said on p. 107, 81 Miss. (32 South. Rep., 943), that: "An appellate court reviews and revises the judgment of the lower court. If that judgment be only upon the jurisdiction, then that is the only question to be reviewed. If the judgment of the lower court be upon the merits, or upon both the question of jurisdiction and of the merits, then that judgment, in its entirety, is to be reviewed and revised by the appellate court." Where the decree of the lower court, as here, shows expressly that the lower court did not pass on the merits, but dismissed the case on some preliminary or collateral question alone, we do not feel authorized to affirm on the merits. It is not a question here of affirming on the merits a case which was decided on the merits, but where the

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decision was put on a wrong ground, as was done in *Railroad Co.* v. *Adams, supra.*

Let the decree be reversed and the cause remanded, with leave to the defendant, if desired, so to amend its pleadings as to put the character of the complainant in issue.

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NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY *v.* AMELIA BROOKS.

1. RAILROADS. *Injury at crossings. Unlawful speed.* *Code* 1892, § 3546. *Evidence. Neglect to give signals.*

   Evidence that defendant railroad company, without giving any signals, ran an extra train in the night time, at a speed in excess of the lawful rate (Code 1892, § 3546) over frequented street crossings, by which a person was killed, is sufficient to sustain a finding of negligence and to support a verdict for plaintiff against the defendant in an action for the wrongful death of the person so killed.

2. SAME. *Contributory negligence. Conflict of testimony.*

   In such case, there being a controversy touching the conduct of the deceased at the time of the injury, one view of the facts exonerating him from negligence, the question of his contributory negligence was properly submitted to the jury.

3. SAME. *Code* 1892, § 1808. *Prima facie case. Presumption.*

   Where, in an action for death, it was shown that the injury was inflicted by the running of defendant's train, the statutory presumption that the injury was the result of defendant's negligence could only be rebutted by clear proof by defendant of facts exonerating it from blame.

FROM the circuit court of Pearl River county.

HON. WILLIAM T. MCDONALD, Judge.

Mrs. Brooks, the appellee, was plaintiff, and the railroad company, the appellant, defendant in the court below. The suit was for the alleged wrongful killing of plaintiff's husband.

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From a judgment for $1,999.98 and costs of suit in plaintiff's favor the defendant appealed to the supreme court.

The testimony for plaintiff was, in substance, as follows: Appellee's husband was killed within the corporate limits of the town of Poplarville about dark by a freight train of appellant going south, running at a rapid speed—exceeding the statutory rate of six miles per hour. He was found about one hundred feet north of a street crossing and about three hundred yards south of the railroad depot. The train—an extra freight—when it approached the depot slowed up some, and blew several blasts of its whistle, but after having been advised by the signal board to go ahead the engineer put on steam and ran at an accelerated speed, not blowing the whistle or ringing the bell after he passed the depot, passed one crossing without giving any signal, and ran into Brooks about one hundred feet north of the second crossing, inflicting injuries from which he died in a short time afterwards. That both the crossings south of the depot were constantly used by the traveling public, and a number of people lived in that vicinity. That Brooks was seen some distance away from where he was struck about thirty minutes before the accident. For appellant it was testified that the freight train of twenty-two cars was fully equipped with air brakes, was being pulled by an engine with a headlight burning; that the whistle was blown a number of times after passing the depot, and the bell was kept ringing; that at or about the station the track curved, Brooks being on the outer or eastern side. The engineer testified that he was on the lookout, and did not see Brooks, and knew nothing about having struck him until told of it by the fireman. The fireman testified that he was on the lookout, and saw an object on the track when the engine neared Brooks, which he first took to be a newspaper, then a calf, and, just as the engine passed over it, he saw it was a man, and called out to the engineer that a man had been struck; that the train was stopped as quick as possible, and he and the engineer went back and found Brooks on the side of the track, mortally

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wounded. One witness for defendant testified that he passed the crossing just south of where the accident occurred, and saw some one in his shirt sleeves sitting on the track about one hundred feet north of the crossing; that he had his face toward the south and his back to the north; and this was about thirty minutes before the accident occurred. One Schrader testified in rebuttal for plaintiff that he saw the fireman on the night of the accident, and the fireman told him then that he saw Brooks just before the train struck him, and that two men ran off from him. The fireman had denied making such statements to Schrader when he was on the witness stand.

Defendant's motion for a new trial was overruled.

Fewell, Bozeman & Fewell, and *McWillie & Thompson,* for appellant.

The question presented is whether there can be a recovery against a railroad company for damages sustained by reason of the failure of its servants to comply with the requirements of the law in respect to the rate of speed in an incorporated town and the giving of signals at crossings where a man sitting or lying on the main track is run over and killed, in the absence of evidence of willfulness.

There is no dispute that Brooks was sitting or lying on the track of the main line at a point where there was no crossing, or that he might have heard the approaching train and seen its headlight in plenty of time to have gotten off the track.

Surely it will not be contended that Brooks was in the exercise of ordinary care, or any care. Indeed, the taking and keeping the position he was in was not only want of care for himself; it was recklessness of the worst sort. And we are at a loss to understand upon what ground it can be contended that his conduct was not reckless. If it was not recklessness, if his conduct was not such as to contribute directly and proximately to his death, then it would be hard to conceive of facts which would be reckless or contributive.

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In *Alabama, etc., Ry. Co.* v. *Carter,* 77 Miss., 511, it is decided that "to render the company liable the speed must be the proximate cause of the injury." Chief Justice Whitfield, speaking for the court in that case, said: "The determinative questions in such cases are whether the excessive speed was the proximate cause and whether the plaintiff was guilty of contributory negligence which would bar recovery. If plaintiff be a trespasser and guilty of contributory negligence, he is barred, whether trespasser or not, by that contributory negligence, unless the injury be willfully, wantonly, or recklessly inflicted."

Broad as the language of the six-mile statute is, the number of decisions that have been made upon it have given it a definite construction that it does not cut off the defense of contributory negligence, and the legislature has impliedly approved the construction placed upon the statute by the courts by leaving it on the statute books unamended as to this point. This court has so remarked. *Clisby* v. *Railroad Co.,* 78 Miss., 937.

D. E. Sullivan, for appellee.

A *prima facie* case was made against defendant by proving that the injury was inflicted by defendant's train while running at a greater rate of speed than six miles per hour through the corporate limits of the town of Poplarville. The only way defendant could escape liability was to sustain its plea of contributory negligence by evidence so full and conclusive that the court could confidently say that there was nothing for the jury to decide. Even though the defendant could have shown by a preponderance of the evidence that deceased was guilty of contributory negligence, if the injury was willfully, wantonly, or recklessly inflicted, contributory negligence would be no defense. See *Railway Co.* v. *Carter,* 77 Miss., 511. The defendant must enlighten the court and jury as to the conduct of deceased, and show that he did not exercise that care and caution which a reasonably prudent man so situated would have exercised; and this must be shown, not merely by a preponder-

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ance of the evidence—for then the jury would be entitled to pass on the case—but before the case can be taken from the jury this proof must be conclusive. What was the defendant able to prove on this point? Instead of proving this so clearly that the question of negligence of the deceased was put beyond the pale of controversy, the defendant proved practically nothing. Who can tell from the evidence in this case what deceased was doing when struck and killed? No one knows whether he was "sitting or lying on the track," as counsel assume in their brief; whether he was walking along or across the track; whether he was asleep or awake, conscious or unconscious, or stricken suddenly with some malady that deprived him of the power of locomotion and left him an easy victim to defendant's locomotive, which was thundering through the most populous part of the town at a high and dangerous rate of speed. The whole matter is shrouded in mystery; a cloud hangs over it all. The law has placed the burden on the defendant to clear up the situation, in order that the court and the jury may say whether or not the deceased was guilty of contributory negligence.

In *Railroad Co.* v. *McGowan,* 62 Miss., 682, the court said: "It is not contributory negligence *per se* to be on a railroad track at a place where the person had no right to be. A person's being there is a condition but for which injury could not be done him by the locomotive or cars, but his being there is not what constitutes contributory negligence. Whether his being on the track not at a crossing is contributory negligence depends on circumstances."

The court also said in the above case: "A railroad company violates the statute at its peril, and must respond for any damages done in such wrongdoing, and must bear the burden of exculpating itself from liability in such case, as in others; but if it shall appear that plaintiff failed in the degree of care which under the circumstances it was incumbent on him to observe to avoid injury, he cannot recover."

Defendant's train was running through the town by the

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depot over public crossings, and at a time when a train was not expected, at a dangerous rate of speed, as high as thirty-five miles per hour, with no whistle blowing and no bell ringing, and evidently no lookout kept. This amounted to recklessness, and would make defendant liable if it had been proven that deceased was guilty of contributory negligence.

In *Stevens* v. *Railroad Co.,* 81 Miss., 195, the court said it must be a rare case of negligence that the court will take from the jury. It was also held in that case that where a train was running through a much frequented part of a city, at a speed greater than allowed by law, and without giving any signals, the railroad company was guilty of recklessness amounting to willfulness, and the party injured might recover without reference to whether he was rightfully or wrongfully on the track.

TRULY, J., delivered the opinion of the court.

The court refused the appellant a peremptory instruction, but the theory of the defense, in each of its varying phases, was fully and fairly submitted for the determination of the jury. The sole question here presented is whether, under any view of the case, accepting as true, and giving the most favorable consideration to, the testimony of the appellee, this judgment can be sustained. That the employes of appellant were guilty of negligence is manifest. To run an extra freight train, at an unusual time, through a thickly settled part of a town, at a rapid rate of speed, in the night time, over frequented street crossings, and without giving any signal or ringing any bell, must assuredly be deemed negligence. The appellee did not insist, nor did the court instruct, that such acts on the part of the railroad employes was gross negligence, but allowed the jury to pass on the question of whether the conduct of Brooks, the injured party, as disclosed by the testimony, was such as to constitute, under the circumstances of this case, contributory negligence. Manifestly, appellant has no ground of complaint on this score. It is contended that the facts of the case show beyond dispute

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that Brooks, the person injured, was guilty of such recklessness as to preclude recovery by appellee. But the conduct of Brooks at the time of the injury was of itself a controverted fact, and this and all other controverted facts must be submitted to the jury. This was done by the trial judge, and their determination was adverse to the contention of appellant. The jury, upon disputed facts, guided by fair and accurate instructions, having found that the negligence of appellant was the proximate cause of the injury, and there being some testimony to sustain that finding, we must decline on this ground to reverse the judgment, even though it may be granted that the question was one of doubt.

There is yet another principle of law, well settled in this state, which required the submission of the case to the jury. It was shown beyond peradventure that the injury was inflicted by the running of the train. This was *prima facie* proof of negligence, authorizing a recovery by plaintiff. To overcome this statutory presumption, it devolved upon the appellant to exculpate itself by establishing to the satisfaction of the jury such circumstances of excuse as would relieve it from liability. But this statutory presumption cannot be overthrown by conjecture. The circumstances of the accident must be clearly shown, and the facts so proven must exonerate the company from blame. If the facts be not proven and the attendant circumstances of the accident remain doubtful, the company is not relieved from liability, and the presumption controls. In this case the testimony of the fireman, by whom alone it was sought to prove the details of the accident, was contradictory and discredited. With this testimony out of the record, the presumption of negligence applies, for the accident remains unexplained. It may well be that the jury doubted or rejected the testimony, as it was in their province to do, and decided that appellant had not established its freedom from negligence. This consideration is likewise sufficient to sustain the finding of the jury.

Affirmed.

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LEWIS ORMAND v. WILLIAM WIRT WHITE ET AL.

CONSTITUTIONAL LAW. *Constitution* 1890, *sec.* 33. *Stock law. Code* 1892, §§ 2055–2059. *Statute. Operation on future contingency.*

The operation of a statute may be dependent upon a future contingency, without being unconstitutional, and §§ 2055-2059, Code 1892, providing for the establishment of stock-law districts by petition and vote, do not violate sec. 33, Constitution 1890, vesting the law-making power of the state in the legislature.

FROM the circuit court of Scott county.

HON. JOHN R. ENOCHS, Judge.

White and others, the appellees, instituted proceedings for the establishment of a stock-law district, under Code 1892, § § 2055–2059; Ormand, the appellant, opposed and defeated the proceeding before the board of supervisors. The present appellees, White and others, appealed the controversy to the circuit court, and there succeeded in having the order of the board of supervisors denying their petition reversed. From this judgment of the circuit court Ormand appealed to the supreme court, contending that the statute, Code 1892, §§ 2055–2059, upon which the proceeding was based, is unconstitutional, repugnant to Constitution 1890, sec. 33, and an effort to delegate legislative power.

S. H. Kirkland, and *R. L. Bullard,* for appellant.

J. B. Sullivan, for appellees.

WHITFIELD, C. J., delivered the opinion of the court.

It is far too late now to question in Mississippi the constitutionality of the statutes like the one here assailed. That the act is constitutional is thoroughly settled by the cases of *Schulherr* v. *Bordeaux,* 64 Miss., 59 (8 South. Rep., 201), and *Alcorn* v. *Hamer,* 38 Miss., 652, with the authorities cited in these two cases and in the briefs of counsel in the two cases. The case

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so strongly relied on by counsel for appellant, *Lammert* v. *Lidwell,* 62 Mo., 188 (21 Am. St. Rep., 411), was also relied on in tho case of *Schullherr* v. *Bordeaux,* above cited.

Affirmed.

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William C. McCaughn v. George Young.

1. **Practice.** *Peremptory instruction. Review.*

   Upon review of the giving of a peremptory instruction, the party against whom it was given is entitled to have all the testimony in his favor considered as true; and the giving of such an instruction is proper only where admitting all the evidence to be true and all just inferences therefrom, it is insufficient to sustain a verdict contrary to the one directed.

2. **Deed of Trust.** *Trustee's power. Sale. Departure from terms of deed.*

   If a trustee fail in any material particular, in making a sale under a deed of trust, to follow the terms of sale prescribed in the deed, the sale will be invalid.

3. **Same.** *Burden of proof. Presumption. Recitals in trustee's deed.*

   The power of sale being shown to be in the trustee, his subsequent sale under the deed of trust is presumed to have been lawfully made, although the deed from him fails to recite the power under which he acted, or that he complied with the conditions of sale prescribed in the deed of trust; and the burden of proof to show invalidating irregularity is upon the party denying the validity of the trustee's sale.

4. **Adverse Possession.** *Elements. Code* 1892, §§ 2730, 2734.

   The essential elements which are necessary to constitute an effective adverse possession are a hostile, actual, open and notorious, exclusive and continuous occupancy for the (Code 1892, §§ 2730, 2734) statutory period.

5. **Same.** *Actual occupancy. Notice. Hostility.*

   One in possession of land, holding under a trustee's deed purporting to convey title thereto, who notified the grantor in the deed of trust that he had purchased and held the land as owner, occupied in hostility to said grantor, although the trustee's sale at

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which he purchased was void because of some invalidating irregularity.

6. Same. *Wild land. Public acts of ownership.*

Actual occupation, cultivation, and residence are unnecessary to constitute actual possession, in the sense of being adverse to the true owner, where the land is so situate as not to admit of permanent, useful improvement, and the continued claim of possession is evidenced by public acts of ownership.

7. Same. *Payment of taxes. Cutting timber.*

One who, after receiving a deed to wild land not susceptible of occupancy, improvement, or cultivation, paid the taxes for a long term of years, during which the former owner neither paid taxes nor asserted any claim to the land, and used the timber from the land in the same way and to the same extent that he used timber from other lands belonging to him, with the knowledge of the former owner, and placed mortgages of record on the land, and offered the same for sale to the public, possessed the lands adversely to the former owner.

8. Same. *Actual notice.*

A possession which is adverse and actually known to the true owner is equivalent to a possession which is open and notorious and adverse.

9. Same. *Abandonment. Absence from state.*

The absence from the state of an adverse claimant of wild land does not constitute an abandonment by him of his possession, so as to break the continuity of the same, where such possession was open, notorious, and with the knowledge of the former owner, and under an instrument constituting color of title, and there was nothing to show an intention on his part to abandon the land, or a claim of title by the former owner during his absence.

From the circuit court of, first district, Coahoma county.

Hon. Samuel C. Cook, Judge.

Young, the appellee, was plaintiff, and McCaughn, the appellant, was defendant in the court below. The action was an ejectment. From a judgment in plaintiff's favor the defendant appealed to the supreme court. The opinion states the facts of the case.

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D. A. Scott, for appellant.

It should be borne in mind that the land in controversy was uncleared woodland until after the same was purchased in 1900 by appellant, and was not susceptible of being occupied as cleared or improved land would be. The appellant, and those through whom he claims title to the land, did, however, take possession of the same, and use and claim title to it, in the only possible way by which possession can be taken of the character of land in controversy. They paid taxes on the same for a period of more than fifteen years; it was assessed to them on the land assessment rolls; timber was cut from it from time to time and appropriated by them as owners; ownership was claimed and asserted, and they repeatedly offered the same for sale. The records show that Roselle was conveying the same from time to time, and it also appears that the appellee was fully aware of all of these facts long before and at the time of the purchase of the land by this appellant, and should not, therefore, be permitted, at this late date, to oust the appellant, who is a *bona fide* purchaser.

We now insist, with confidence, that the court below erred in granting a peremptory instruction directing the jury to return a verdict in favor of the appellee. The question as to whether the facts in the evidence did or did not constitute adverse possession for the length of time sufficient to toll the appellee's right of entry, being a question of fact, should have been submitted to the jury for their determination. We can scarcely conceive of how it is possible to prove adverse possession of wild, uncultivated woodland by evidence other than such as is developed by this record.

As to what does or does not constitute adverse possession of land depends largely upon its character, the uses and purposes to which it can be put or to which the owner may choose to put it; and we also insist that whatever is sufficient to cause the owner to inquire is amply sufficient, as to woodland, if such inquiry would lead him to a full knowledge of the facts. It is not

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always necessary that there should be any actual occupation or enclosure to constitute adverse possession.

The supreme court of the United States has held—and, indeed, it is now considered a settled doctrine of that court—that to constitute an adverse possession there need not be a fence, building, or other improvement made, and that it suffices for this purpose that visible and notorious acts of ownership are exercised over the premises in controversy for the time limited by the statute; much depends upon the nature and situation of the property, the uses to which it can be applied, or to which the owner, or claimant, may choose to apply it; that it is difficult to lay down any precise rule in all cases, but that it may be safely said that where acts of ownership have been done upon land which, from their nature, indicate a notorious claim of property in it, and are continued sufficiently long, with the knowledge of an adverse claimant, without interruption or adverse entry by him, such acts are evidence of an ouster of the former owner, and an actual adverse possession against him, provided the jury shall think that the property was not susceptible of a more strict possession than had been so taken and held; that neither actual occupation, cultivation, nor residence is necessary to constitute adverse possession, when the property is so situated as not to admit of any permanent, useful improvement, and the continued claim of the party has been evidenced by public acts of ownership such as he would exercise over property which he claimed in his own right and would not exercise over property which he did not claim. *Ewing* v. *Barnett,* 11 Pet. (U. S.), 53; *Elliott* v. *Pearl,* 10 Pet. (U. S.), 442; *Barclay* v. *Howells, Lessee,* 6 Pet. (U. S.), 513.

See also the following authorities: *Royal* v. *Lessee of Lyle* (Ga.), 60 Am. Dec., 712; *Draper* v. *Shoot* (Mo.), 69 Am. Dec., 462; *Key* v. *Jennings,* 60 Mo., 367; *Mormant* v. *Eureka Co.* (Ala.), 39 Am. St. Rep., 45; Ewell on Ejectment, 725; *Sawyers* v. *Giddings,* 90 Mich., 50; *Coogar* v. *Morris,* 48 N. J. Law, 607; *Langworthy* v. *Myers,* 4 Iowa, 18; *Woods* v. *Montville,*

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etc., Co., 84 Ala., 560; *Clemmons* v. *Perry,* 34 Iowa, 564; *Beck* v. *Farr,* 66 Iowa, 684; *Forey* v. *Bigelow,* 56 Iowa, 381; *Welder* v. *Clark,* 74 Cal., 11; *Omaha, etc., Co.* v. *Barrett,* 3 Neb., 803; *Brown* v. *Clark,* 89 Cal., 196; *Brooks* v. *Bryan,* 18 Ill., 533; *Kerr* v. *Hitt,* 75 Ill., 51; *Coleman* v. *Billings,* 89 Ill., 183; *Downing* v. *Mays,* 46 Am. St. Rep., 896; *Vicksburg, etc., R. Co.* v. *Ragsdale,* 54 Miss., 200; *Willie* v. *Brooks,* 45 Miss., 542; *Nixon's Heirs* v. *Carcos,* 28 Miss., 414.

O. G. Johnson, on the same side.

We invoke against appellee the doctrine of *estoppel in pais,* or equitable estoppel. This doctrine, having its origin in equity, has by universal custom become a well-settled and important branch of the law. The fundamental principle upon which this doctrine is based is the equitable one of suppression of fraud and the enforcement of honesty and fair dealing. The term "equitable estoppel" was applied to it for the reason that the jurisdiction of enforcing this equity belonged originally to the courts of equity, and was not exercised by courts of law until a comparatively recent date. It has been said, however, in a modern case, that "these estoppels are now called equitable tribupels, not because their recognition is peculiar to equitable tribunals, but because they arise upon facts which render their application in the protection of right equitable and just." The doctrine of estoppel is applicable to the sale of land, as well as personal property, and is available in action at law for land. *Dickerson* v. *Colgrove,* 100 U. S., 578; *Kirk* v. *Hamilton,* 102 U. S., 68; *Pickard* v. *Sears,* 6 Am. & Eng. Ency. Law, 469.

The supreme court of the United States, in the case of *Dickerson* v. *Colgrove, supra,* has admitted that where the title to land is in question, the doctrine of equitable estoppel was available at law, though it states that "this is certainly not the common law." The old maxim that "estoppels are odious" is not properly applicable to equitable estoppels, as they are founded on the highest principles of morality and justice, and are re-

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garded by all courts as tending to suppress fraud and injustice. Since this decision, the doctrine has become well established in all of the courts, both of law and equity, throughout the union.

These estoppels are not to be construed strictly, but are entitled to a fair and liberal application, in the same manner as other equitable doctrines which are admitted to suppress fraud and promote honesty and fair dealing. *Burkhalter* v. *Edwards*, 16 Ga., 573; *Shaw* v. *Bebee*, 35 Vt., 205.

The rule of law, as laid down in *Pickard* v. *Sears*, *supra*, is clear that where one by his words or conduct willfully or negligently causes another to believe the existence of a certain state of things and induces him to act upon that belief, so as to alter his previous position, the former is precluded from offering against the latter a different state of things as existing at the same time. The conduct of one on standing by, thus giving a kind of sanction to the proceedings, is in fact of such a nature that the opinion of the jury should be taken as to whether or not he had in point of fact ceased to be the owner. Conduct by negligence or omission, where there is a duty cast upon a person to disclose the truth, will frequently have the effect of estopping the party guilty of such negligence or omission from afterwards claiming his rights. *Caddy* v. *Owen*, 34 Vt., 598; *Smith* v. *Paysinger*, 2 Mill. (La.), 59.

One who has so conducted himself cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct. *Cornish* v. *Abingdon*, 4 H. & N., 549.

This doctrine of equitable estoppel, as stated above, is a very broad one, instituted for the purpose of the suppression of fraud and dishonesty; and unless the courts at law are willing to abandon the duty of administering this equitable doctrine effectually in the suppression of fraud and unfair dealing, its application cannot be confined within the limits of any narrow technical definition, such as will relieve the court from looking, as in other cases depending on fraud and dishonesty, to the circumstances of each particular case. The court in the case of

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Swan v. *Australasian Co.*, 7 H. & N., 603, makes the following statement regarding the general rule now acted upon with reference to estoppels by negligence and of the limitations of that rule. It states in part that "if he has led others into the belief of a certain state of facts, by conduct of culpable negligence calculated to have that result, and they have acted upon that belief to their prejudice, he shall not be heard afterwards as against such persons to show that the state of facts did not exist." In short, and in popular language, a man is not permitted to charge the consequences of his own fault on others, and complain of that which he himself brought about. However, after all is said, the exclusive warrant for an equitable estopped is that it is necessary to sustain the cause of right and justice. *Ferguson* v. *Millikin*, 42 Mich., 202.

We submit that in the cause at bar, the cause of right and justice would suffer irreparably if appellee herein be permitted, in the face of such negligence as he has shown, to now reclaim this property by tacitly denying the existence of proceedings which he will not deny, or has not denied, in the court, and which he has tacitly admitted by his conduct for the past fifteen years.

A grantor who knows that parties are in adverse possession, but never intimates that he has any title, cannot, to the prejudice of such parties, afterwards assert it. *Baker* v. *Humphreys*, 100 U. S., 494; *Collier* v. *Pfenning*, 34 N. J. Eq., 22; *Newman* v. *Hood*, 30 Mo., 207; *Lippman* v. *McCrawie*, 30 La. Ann., 307; *Railroad Co.* v. *Hamilton*, 59 Ga., 171; *Post* v. *Post*, 13 R. I., 495.

In the case at bar appellee makes no denial of the sale by the trustee, nor does he attempt to deny that the purchase money resulting from the sale of this land was applied to the payment of his debts, or that he received the benefit of such purchase money; and yet without offering to restore this money, appellee now seeks to recover the property. This, in view of the facts and

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circumstances surrounding this case, would certainly be contrary to good conscience and repugnant to every sense of justice.

It has been held in *Thomas* v. *Poole,* 19 S. C., 323, and *Odell* v. *Rogers,* 44 Wis., 26, that where the court decrees the sale of an adult's land, and he assents to it, he is estopped. It makes no difference in the application of this principle where the proceedings under which this sale occurred are voidable, or wholly void, in consequence of the want of jurisdiction. *Sprague* v. *Shriver,* 25 Pa. St., 282.

The design and intent of the estoppel is to prevent the gross injustice that must necessarily arise where a man accepts all the benefits from an act that it is capable of conferring, and then sets it aside to the injury of third persons.

A defendant who has notice that his property is about to be sold by the officials of the law for the payment of his debts, and who makes no objection until an innocent purchaser has paid the purchase money and received a deed duly acknowledged, is estopped from objecting afterward, even if the judgment on which it was sold was paid; the payment cannot be set up against a purchaser. *Crawford* v. *Ginn,* 35 Iowa, 543; *Hereford* v. *Bank,* 53 Mo., 330.

A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute the fact in an action against the person whom he himself assisted in deceiving. *Gregg* v. *Wells,* 10 Ad. & Ell., 97.

The authorities are numerous to the effect that it is apparent fraud in one holding the legal title to land to allow a sale of this land to be publicly made without giving notice of his title to the intending purchaser, nor is it necessary to create an equitable estoppel that such owner should design to mislead. It is sufficient if the act was calculated to mislead, and has misled, a person acting upon it in good faith, and who has exercised reasonable care and diligence under all circumstances. *Banks* v. *Hazard,* 30 N. Y., 226.

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We submit that the appellee herein cannot now be heard to deny the authority of the trustee, Johnson, for making this sale, inasmuch as said appellee, by his own act, enabled this trustee to hold himself out to the world as one duly authorized to sell, and hence cannot now question this authority.

Mayes & Longstreet, for appellee.

It is perfectly well settled law in this state that in an action of ejectment equitable estoppels are not available as matter of defense. If a defendant wishes to rely upon such ground, he must take refuge in the court of chancery. *Morgan* v. *Blewitt,* 72 Miss., 903; *Graham* v. *Warren,* 81 Miss., 330; *McLeod* v. *Bishop,* 110 Ala., 640.

Defendant offered in evidence a deed to A. B. Roselle, executed by one "F. C. Johnson, Trustee," on the 11th of January, 1887. Standing alone, this deed, containing no recitals and having nothing whatever to support it, is utterly futile and worthless. If it had contained proper recitals, it would have made out a *prima facie* case of authority to act; but it contains no recitals whatever, and gives no information whatever.

Even in the absence of proper recitals, extrinsic testimony might have been admissible to apply the deed and show the authority of the trustee to act; but there was no extrinsic testimony of any worth whatever. 28 Am. & Eng. Ency. Law, 825; 35 Cent. Dig., secs. 1119, 1121; *Graham* v. *Fitts,* 53 Miss., 307; *Tyler* v. *Herring,* 67 Miss., 169.

These two Mississippi cases first cited might seem to militate against the position taken above, and to hold that a trustee's deed raises a presumption that everything was regularly done; but they do not. The deeds under consideration in those cases showed on their face that they were trustee's deeds, and contained recitals which made out a *prima facie* case, whereas this deed does not.

This case falls far short of the requirements of the statute of limitation. The scrambling and uncertain and occasional acts

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of possession indicated by this record are very far from being such acts of possession as would have started the statute of limitation at all. The appellant can make nothing out of a constructive possession, for the simple reason that in the case of wild land, not actually occupied, the law would contribute the constructive possession to the owner of the real title. *Hicks* v. *Steigleman*, 49 Miss., 377; *Paxton* v. *Valley Land Co.*, 68 Miss., 739; *Dixon* v. *Cook*, 47 Miss., 220; *Jones* v. *Gaddis*, 67 Miss., 761; *Railroad Co.* v. *Buford*, 73 Miss., 494.

Argued orally by *O. G. Johnson*, and D. A. Scott, for appellant, and by *Edward Mayes*, for appellee.

Truly, J., delivered the opinion of the court.

This is an action of ejectment instituted by George Young, appellee. On the trial hereof in the circuit court, plaintiff, having established his record title, closed his case. At the conclusion of the testimony for the defendant, McCaughn, appellant here, the court gave a peremptory instruction for the plaintiff, and this action of the court is assigned as error.

It is well settled in our state that, where a peremptory instruction is given, the losing party is entitled, upon the review of the action of the court, to have all facts in his favor considered as true. A peremptory instruction is proper only in cases where, with all the facts in evidence taken as true, with every inference from them, they fail to maintain the issue. *Whitney* v. *Cook*, 53 Miss., 551; *Railroad Co.* v. *Boehms*, 70 Miss., 11 (12 South. Rep., 23). Appellant, therefore, is entitled to have all the facts testified to in his behalf accepted as true upon our consideration of this record. Those facts are: That George Young, prior to 1885, had been the owner of the land in controversy; that about that date he executed a trust deed, or mortgage with power of sale, on the land to W. J. Crowley, beneficiary, and F. C. Johnson, trustee; that this instrument was foreclosed by public sale on January 11, 1887, at which sale A. B. Rozelle became the highest bidder, and the

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land was struck off to him, and a deed executed by the trustee conveying the land; that Young was aware of the fact that his land was about to be sold, and was advised of Rozelle's intention to purchase, and, after the sale, was notified by Rozelle that he had bought the land and claimed it under the deed from the trustee; that thereafter Rozelle paid the taxes upon the land in his own name or that of his wife, entered into possession, erected a sawmill upon an adjoining tract, cut all the timber suitable for milling from the land, and sold the remainder to parties for cross-tie purposes; and he publicly offered the land for sale, and executed trust deeds thereon to secure a certain indebtedness which he owed. Under one of such trust deeds, after Rozelle had left the state in 1892, the property was sold and purchased by the Adams Machine Company, which remained in possession, paying taxes, and offering the same to the public for sale, until the year 1900, when appellee purchased from the machine company and entered into actual occupancy, cutting and deadening timber and clearing the land for cultivation, and had, prior to the institution of this suit, on the 29th of August, 1902, cleared seven and three-fourth acres and deadened half the entire tract. It was further in proof by several witnesses that Young knew of the claim that Rozelle made to the land, and knew that the land had been sold under the trust deed which he had executed in favor of Johnson, trustee; and that on one occasion, after appellant had entered into occupancy of the land, the appellee had a conversation with him, in which he spoke of desiring to purchase some land, but made no claim to having any interest in the title to this land, for which he afterwards instituted this suit.

The court, in its ruling on the motion to exclude the testimony in behalf of the defendant, stated that the proof failed to show that the defendant, McCaughn, had acquired title to the land, either by conveyance or adverse possession. To sustain this ruling of the court, it is said by counsel for appellee, as to the first ground, that the action of the court was correct

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in holding that appellant had no title by conveyance, for the reason that the trust deed which the witnesses testified that Young had executed to Johnson, trustee, was not of record, and its loss not sufficiently proven. Under the general rule, as stated, the facts testified to in behalf of appellant upon every issue must be accepted on this hearing as true. We find, therefore, that the fact of the existence of the trust deed or mortgage is proven by the direct and positive testimony of the witness Rozelle, who stated that he had seen the instrument in question, had read it on the very day on which the land had been sold under its terms; that it was executed by George Young, whose signature he knew; that the beneficiary was Crowley, and the trustee Johnson; that he was familiar with the mode of foreclosure of such instruments, and, so far as he knew, the sale in question was regularly and formally made by public outcry to the highest bidder, and a deed executed by the trustee, in pursuance of such sale, and delivered to him as purchaser. This proof of existence, in the absence of all contradiction, was ample, and the proof of loss of the instrument, so as to account for its non-production and justify the admission of testimony of its contents, equally so. More than fifteen years after the foreclosure and sale under the lost instrument had elapsed before the institution of this suit. During that time the beneficiary had died, his storehouse burned, with a large part of his business papers, search had been made among all his papers known still to be in existence, the trustee had died, and actual search was made among all his papers where a trust deed might probably have been. In addition, search was made of all records of the proper chancery clerk's office, without success. Under such circumstances, in view of the great lapse of time and the various changes wrought by death, this proof was sufficient to make proper the admission of secondary evidence as to the contents of the lost instrument.

It is said, however, that, granting the existence and loss of the instrument, still the deed from the trustee to Rozelle, pur-

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porting to convey the land in question, was void because of its failure to contain recitations showing the power under which the trustee made the sale, and that the terms and conditions of the instrument under which the sale was alleged to have been made had been substantially complied with. The deed under consideration simply states that the grantor Johnson, "as trustee," in consideration of a certain sum in cash paid to him "as trustee," conveys the land now in controversy to Rozell, the grantee. The deed contains no reference to any grant of power to the trustee authorizing him to act, and there is no recital of the performance of any of the formalities usually incident to foreclosure of similar trust deeds, or mortgages with power of sale, such as are always inserted by the careful conveyancer. The established rule is that a trustee who undertakes to execute a trust vested in him by a sale of the trust estate must follow the mode, manner, and terms prescribed by the deed under which he claims grant of power, and the sale will not be valid if there is any material failure in this regard. If, as a matter of fact, the directions of the trust deed be adhered to in all substantial matters, the mere failure to recite in the deed the power under which the trustee acted, or that the conditions of the trust in conducting the sale were observed, will not, as a matter of law, annul the sale or invalidate the deed executed by the trustee to the purchaser. 2 Jones on Mort., sec. 1889. When a deed executed by a trustee purports to convey as trustee a certain estate, the presumption of law is, not only that the recitals of the deed are true, but that all essential conditions were complied with in making the sale. When such a deed is sought to be avoided on the ground of irregularity or failure to comply with the terms of the power in making the sale, the burden, at all events after proof of power in the trustee, is upon the party seeking to avoid the deed to prove the existence of such invalidating irregularity. When a sale *in pais* is made by a trustee under an instrument conferring upon him a power of sale on the happening of certain contingencies, the rule is

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thus stated in *Enochs* v. *Miller,* 60 Miss., 21: "The making of the deed is *prima facie* evidence that the sale was properly made, and will throw upon him who attacks or resists it the burden of showing the contrary." *Graham* v. *Fitts,* 53 Miss., 307; *Tyler* v. *Herring,* 67 Miss., 169 (6 South. Rep., 840; 19 Am. St. Rep., 263). The case of *McMahan* v. *B. & L. Ass'n,* 75 Miss., 969 (23 South. Rep., 431), cited by appellee, is no authority for a contrary view, for in that case the sale was made "in disregard of the plain provisions of the instrument," and that fact was shown affirmatively by the record. This is in accord with the view expressed in *Enochs* v. *Miller, supra,* which is supported by the great weight of authority. *Burke* v. *Adair,* 23 W. Va., 139; *Farrar* v. *Payne,* 73 Ill., 82; *Lunsford* v. *Speaks,* 112 N. C., 608 (17 S. E., 430); 2 Jones on Mort., secs. 1830-1895. We refer specially to the recent case of *Atkinson* v. *College,* 54 W. Va., 32 (46 S. E., 253), where, after a full discussion of the rights of parties growing out of sales by trustees, the conclusion of the court is thus stated: "Hence, as against a third party, one in no way connected with the deed of trust except by his act of purchase, and in no way charged with the responsibility for the regularity of the proceedings, nor having power of control over them, nor affected with any notice of irregularities or equities, reason, justice, and authority make it manifest that the complainant must take upon himself the burden of showing wherein the sale is illegal, or an equity against the purchaser arises in his favor. It is the assertion of a cause of action, the whole burden of which is upon the plaintiff." In the instant case it was incumbent upon the appellee, if he desired to resist the effect of the deed from Johnson, trustee, to Rozelle, to have proven that the sale in pursuance of which the conveyance was executed was void by reason of a failure on the part of the trustee to follow in some essential particular the terms prescribed by the trust deed. This he did not undertake to do.

There being no evidence of any extrinsic matters affirmative-

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ly showing any lack of regularity in the sale by the trustee, appellant was entitled to have the following facts considered as established and true: That appellee had executed a trust deed to Johnson, trustee; that the land in controversy was included therein; that the instrument was foreclosed, and the deed in evidence executed in pursuance thereof. These facts, joined to the legal presumption of correctness which attached to the deed of the trustee, warranted the submission of the issue to the determination of the jury. In the absence of all denial, it was error to peremptorily charge against appellant on this ground. He was an innocent purchaser without notice, in possession, and is protected by his deed until that is overthrown.

Nor can we sustain the action of the court in withdrawing from the consideration of the jury the evidence tending to prove appellant's title by adverse possession. The essential elements which are necessary to constitute an effective adverse possession are generally recognized. The occupancy must be hostile, actual, open and notorious, exclusive and continuous for the statutory period. Accepting as true all the facts showing possession by appellant and his vendors, and giving him the benefit of all legal inferences to be drawn from the evidence, does that possession fulfill the tests applied by the general rule announced? That the occupancy of Rozelle and those claiming under him was hostile to any claim of title by appellee is obvious. Rozelle entered into possession under a deed conveying the specific property, and notified the grantor in the deed of trust, the former owner of the land, that he had purchased and held the land as owner. Even had it been shown that the sale conducted by Johnson, trustee, was void on account of some irregularity of which the purchaser had no knowledge, the deed which he delivered in consideration of the *bona fide* payment of the purchase money was sufficient basis of title to render the subsequent occupancy of the purchaser hostile to the former owner of the land. In order to constitute adverse possession the occupancy must, generally speaking, be visible and noto-

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rious, with intent to claim title as against the world. But in view of the fact that property was often of such a character and so situated that actual occupancy was impracticable, if not impossible, the rule was gradually relaxed as to such property. The true doctrine, and the one now generally recognized, is thus stated by Harris, J., in *Ford* v. *Wilson,* 35 Miss. 490 (72 Am. Dec., 137): "That neither actual occupation, cultivation, or residence is necessary to constitute actual possession when the property is so situated as not to admit of any permanent, useful improvement, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right and would not exercise over property which he did not claim." *Worthley* v. *Burbanks,* 146 Ind., 534 (45 N. E., 779); *Hubbard* v. *Kiddo,* 87 Ill., 578; 3 Washburn on Real Property, sec. 1965. "It is not necessary that the occupation should be such that a mere stranger passing the land would know that some one was asserting title to a dominion over it. It is not necessary that the land be cleared or fenced or that any building be put upon it. The possession of land cannot be more than the exercise of exclusive dominion over it." 2 Wood on Limitations, sec. 267. In the instant case the record shows that the lands in controversy, from 1885 until 1900, when appellant entered into actual occupancy, were what are denominated "wild lands," lying in the midst of a vast area of swamp woodland, not susceptible of occupancy, improvement, or cultivation, or of any remunerative or productive use. The test of what constitutes adverse possession of such property must of course be different from that which would be apppolied with reference to cultivated lands or property susceptible of actual use and occupation. The question is, Did the person claiming to hold adversely exercise toward the property the same character of control which he used toward property actually his and which he would not have used over property which did not belong to him? In this case Rozelle had the land assessed to him, and

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he and those claiming under him, for a long term of years, paid all the taxes on the property without question from appellee or any one else. This of itself is a potential fact in proof of a hostile assertion of title by the party paying the taxes.

Discussing the question of the payment of taxes as evidence of adverse possession, the supreme court of the United States says: "Payment of taxes, as described in the above statement of facts, is very important and strong evidence of a claim of title; and the failure of the plaintiff's predecessors to make any claim to the lot, or to pay the taxes themselves, is some evidence of an abandonment of any right in or claim to the property. In *Ewing* v. *Burnet,* 36 U. S. (11 Pet.), 41 (9 L. ed., 624), it was held by this court that the payment of taxes on land for twenty-four successive years by the party in possession was powerful evidence of the claim of right to the whole lot upon which the taxes were paid. The same principle is held in *Fletcher* v. *Fuller,* 120 U. S., 534, 552 (7 Sup. Ct., 667, 676; 30 L. ed., 759, 764). It is some evidence that the possession was under a claim of right and was adverse." *Holtzman* v. *Douglas,* 18 Sup. Ct., 65 (42 L. ed., 466). The facts of this case bring it plainly within that statement. Appellant and his predecessors paid the taxes for a long term of years, during which the appellee neither paid taxes nor asserted any claim to the land. In addition to the payment of taxes, Rozelle used the timber from the land in the same way and to the same extent that he used timber from other lands admittedly his; he sold timber from the land to others with the knowledge of appellee; he placed mortgages of record on the land, and offered the same for sale to the public. This was the same character of control which he exercised over other property which he owned, and was the only manner in which any one could, at the time in question, have asserted ownership or exercised dominion over property of the same character similarly located.

The underlying principle on which is founded the rule requiring that possession must be open and notorious before it

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can be considered adverse to the real owner is that such character of possession is presumptive notice to the true owner of such possession and adverse claim. But the rule does not apply in cases where the party against whom the adverse claim is asserted has actual knowledge of such adverse possession. A possession which is adverse and actually known to the true owner is equivalent to a possession which is open and notorious and adverse. *Dausch* v. *Crane,* 109 Mo., 336 (19 S. W., 61); *Clark* v. *Gilbert,* 39 Conn., 94; *Alexander* v. *Polk,* 39 Miss., 737; *Ford* v. *Wilson, supra.* The doctrine is concisely stated in this form: "If the owner have actual knowledge that the possession is adverse to his title, the occupancy need not be open, visible, and notorious. Notoriety is important only where the adverse character of the possession is to be brought home to the owner by a presumption." See 1 Cyc., p. 999, par. c, and cases cited.

The appellee insists that the absence of Rozelle from the state for several months prior to the date at which the Adams Machine Company acquired his title to the land was an abandonment of the possession, and constituted a break in the continuous occupancy necessary to ripen a claim into a valid title. The record contains no circumstance from which an intention to abandon his dominion over the land or surrender his claim of title thereto can be inferred. "Possession of land is acquired by an entry on it, with the intention to possess it, and is lost by leaving, with an intention to abandon it." *Harper* v. *Tapley,* 35 Miss., 506. Rozelle's entry and possession was not stealthy or clandestine, but open and notorious, with the knowledge of the appellee. His possession was exclusive, undisputed, and adverse, and under a muniment of title which, even if voidable, constituted a color of title, and the record shows no such state of facts as warranted the trial court in charging as an undisputed fact that the required continuity of occupancy had not been established. "Possession of land once acquired is not lost by a removal from it, if the party removing has color

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of title and by his acts manifests an intention still to claim and use it." *Harper* v. *Tapley, supra; Ford* v. *Wilson, supra; Aldrich* v. *Griffith,* 66 Vt., 402 (29 Atl., 376); *Crispen* v. *Hannaran,* 50 Mo., 549; *Moore* v. *Hinkle,* 151 Ind., 346 (50 N. E., 822). The testimony of Rozelle, standing as it does uncontradicted, shows no intention on his part to surrender his possession, and he continued to treat the land as his own by paying taxes and offering the same for sale. Nor did appellee consider the land as abandoned; for he made no effort to reenter, and, according to the statement of appellant, impliedly acquiesced in and recognized appellant's assertion of ownership —made no claim of title even when appellant had entered into actual occupancy and was engaged in deadening the timber and clearing the land.

Accepting the facts stated in the record as true, and giving the appellant the benefit of the legal inference justly deducible therefrom (as, in view of the peremptory instruction, we are bound to do), we are constrained to reverse the judgment and award a new trial. We confine ourselves to a consideration of the two grounds on which the trial judge based his action in granting the peremptory instruction, without passing upon other assignments of error not necessarily involved in this decision.

Reversed and remanded.

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ALBERT C. C. WEST *v.* MALCOM L. MCCLURE.

1. FORMS OF ACTION. *Tree cutting. Trespass quare clausum fregit. Assumpsit.*

   A count in a declaration averring that defendant entered upon plaintiff's land and cut trees and carried them away, and demanding the value of the trees so cut and carried away, and another count in the same declaration, averring that defendant entered upon plaintiff's land and cut and carried away trees, whereby he became liable to pay plaintiff the value of said trees, and undertook and promised the plaintiff to pay him the value of said trees, are both *in assumpsit*, and not trespass *quare clausum fregit.*

2. LOCAL ACTIONS. *Transitory actions.*

   An action of *assumpsit* to recover the value of trees cut by defendant on plaintiff's land is not local, but is a transitory action; and the proper court of Tennessee has jurisdiction of such an action for trees cut in this state, the defendant being there found and served with process.

FROM the circuit court of Tunica county.

HON. SAMUEL C. COOK, Judge.

McClure, the appellee, was plaintiff, and West, the appellant, defendant in the court below. From a judgment in plaintiff's favor the defendant appealed to the supreme court. The opinion states the facts of the case upon which the decision turned.

Perkins & Winston, for appellant.

The court should have overruled the demurrer to the plea setting up the want of jurisdiction in the Tennessee court to render the judgment sued on in this case.

The plea shows that the circuit court of Shelby county, Tennessee, had no jurisdiction to render the judgment sued on. It shows that the real cause of action in the suit in Tennessee was a trespass to land situated in Tunica county, Mississippi, and that the judgment was rendered for this trespass; that the defendant in that suit was at the time of the alleged trespass,

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and continued to be afterwards, a citizen and resident of Tunica county, Mississippi; that while passing through Shelby county, Tennessee, as a traveler, he was sued in said circuit court in said suit, and that on the trial of the same no evidence was offered, except to prove said alleged trespass.

The court in that suit had jurisdiction only of the person of the defendant. It did not have jurisdiction of the subject-matter of the suit, the real cause of action. Jurisdiction is the authority to hear and determine a cause. To have complete jurisdiction in actions in *personam,* a court must have jurisdiction of the subject-matter as well as the person. 17 Am. & Eng. Ency. Law, 1060; *Foute* v. *McDonald,* 27 Miss., 610.

Jurisdiction of the subject-matter of a suit is conferred by the sovereign authority of the state. 17 Am. & Eng. Ency. Law, 1060; *Cooper* v. *Reynolds,* 77 U. S., 308. By jurisdiction of the subject-matter is meant the nature of the cause of action and of the relief sought. *Cooper* v. *Reynolds, supra.*

The real cause of action, if any, in the suit in Shelby county, Tennessee, arose in Tunica county, Mississippi, within the territorial limits and jurisdiction of the state of Mississippi, and was in its essential nature local. Only the state of Mississippi in its sovereign capacity had the right and power to confer jurisdiction to hear and determine such a cause of action.

It is a fundamental principle that the states of the union are sovereign as respects the power of one to affect the citizens of another by its judgments. Therefore state laws have no extra-territorial effect, and no state can extend its process beyond its territorial limits to subject either persons or property to its judicial decisions. No sovereignty can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity and incapable of binding such persons or property in other tribunals. The courts of a state are, however general may be their jurisdiction, necessarily confined to the territorial limits of the state. Any

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attempt to act upon persons or things beyond them would be deemed usurpation of foreign sovereignty not justified or followed by the law of nations. Such is the familiar, reasonable, and just principle of the law of nations, and it is scarcely supposable that the framers of the constitution designed to abrogate it between states which were to remain as independent of each other for all but national purposes as they were before the revolution. Certainly it is not intended to legitimate an assumption of extra-territorial jurisdiction which would confound all distinctive principles of separate sovereignty. *Deering* v. *Bank of Charleston,* 5 Ga., 497 (s.c., 3 Am. St. Rep., 300); *Weimer* v. *Weimer,* 82 Va., 890 (s.c., 3 Am. St. Rep., 126); *Piquit* v. *Swan,* 5 Mason, 35; *Steele* v. *Smith,* 7 Watts. & S., 451; *Lattimer* v. *Railway Co.,* 43 Mo., 105 (s.c., 97 Am. Dec., 378); Story on Conflict of Laws.

The action of trespass *quare clausum* is of that class which is not merely local in contradistinction to transitory, but it is local in a jurisdictional sense, because the cause of action is territorial, and no court has jurisdiction to try such cause outside of the sovereignty where the land is. *Ellenwood* v. *Chair Co.,* 158 U. S., 107; *Northern, etc., R. Co.* v. *Michigan, etc., R. Co.,* 56 U. S., 233; *Allin* v. *Lumber Co.,* 150 Mass., 560 (s.c., 6 L. R. A., 416); *Dodge* v. *Colby,* 108 N. Y., 445; *Niles* v. *Howe,* 57 Vt., 391; *DuBreuil* v. *Pac. Co.,* 130 Ind. (s.c., 29 N. E. Rep., 909); *Morris* v. *Railroad Co.,* 78 Tex., 17 (s.c., 22 Am. St. Rep., 22); *Livingston* v. *Jefferson,* 1 Brock., 203.

W. A. Percy, for appellee.

The jurisdiction of the Tennessee court to award judgment in an action for the value of timber cut on lands in the state of Mississippi is absolutely settled in the state of Mississippi by the case of *Evans* v. *Miller,* 58 Miss., 120. This case held that whenever timber is cut down and converted into logs an action *in assumpsit* can be maintained to recover their value. The declaration specifically alleges that "being so indebted for said

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trees cut, carried off, and converted to their own use, the defendant undertook to pay," etc.

The same doctrine is reaffirmed in *Alliance Trust Co.* v. *Nettleton Hardwood Co.*, 74 Miss., 584, in which it is held that trover, purely a transitory action, is maintainable for timber cut.

The gist of the action is not, as asserted by the appellant, the trespass on the close, but it is the conversion of the valuable timber to the use of the trespasser. It is not the waste which the trespasser has committed, but the benefit which the trespasser has reaped, which is the subject of suit; and the situation is identical with one that would arise where one entered the close of another and took therefrom valuable furniture or jewels, the taking and removing of the trees being a ground of action entirely independent from the trespass upon the close.

Calhoon, J., delivered the opinion of the court.

McClure, claiming to own some land in Tunica county, Mississippi, finding West in Shelby county, Tennessee, sued him in that county and state, and had him served there with process to defend his action against him. McClure's declaration in the circuit court of Tennessee has two counts. The first avers that West went on his Mississippi land and cut trees, and claims *in assumpsit* the value of the trees so cut and carried off and converted to his own use by West. The second count charges that McClure "entered upon the said land and cut (the trees), and thereupon he became liable to the plaintiff (McClure) for the value of said trees, and thereupon he became liable," etc., and "undertook and promised to pay," etc. Both counts are clearly *in assumpsit* for values on their face, and neither is technically for trespass *quare clausum fregit.* To this Tennessee declaration West pleaded not guilty, *non assumpsit,* and specially that he went on the land and cut the trees under a license from the then owner, and before McClure was owner. On these issues, and these only, trial was had, and a verdict

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Opinion of the court.

rendered for McClure, from judgment on which West appealed to the supreme court of Tennessee, which affirmed the judgment. Thereupon McClure sued West in Tunica county, Miss., on that Tennessee judgment, and West pleaded that the Tennessee court had no jurisdiction, the action in its second count being in fact trespass *quare clausum fregit*, which is local, and not transitory, the land being in Mississippi; and that the other count was put in simply to prevent a plea to the jurisdiction, being a wrongful joinder of *assumpsit* with the trespass. A demurrer to this plea was sustained, and West declined to plead further, and comes to this court. The transcript of the Tennessee record discloses no testimony on either side, but the plea in Mississippi avers that no evidence was offered on the claim *in assumpsit*, and that the jurisdictional point was made and overruled. As to this the Tennessee transcript is silent.

On these facts, and our view of *Evans* v. *Miller*, 58 Miss., 120 (38 Am. St. Rep., 313), and *Alliance, etc.*, v. *Nettleton*, 74 Miss., 584 (21 South. Rep., 396; 36 L. R. A., 155; 60 Am. St. Rep., 531), and *Archibald* v. *R. R. Co.*, 66 Miss., 424 (6 South. Rep., 238), and the intimation in *Oliver* v. *Loye*, 59 Miss., 324, the case now before us is

Affirmed.

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WILLIAM WELCH v. OKAY WILLIAMS ET AL.

VENDOR AND PURCHASER. *Specific performance. Contract. Statute of frauds. Code* 1892, § 4225, *par* (c). *Offer. Acceptance.*

Where an offer to purchase land presents two alternative propositions, a mere acceptance of the offer, without specifying which proposition is accepted, does not create a contract which can be specifically enforced.

FROM the chancery court of Noxubee county.

HON. JAMES F. MCCOOL, Chancellor.

Welch, the appellant, was complainant, and Mrs. Williams and others, the appellees, were defendants in the court below. From a decree sustaining the demurrer of defendants to the bill of complaint and dismissing the suit the complainant appealed to the supreme court. The opinion of the court states the facts of the case.

J. E. Rives, for appellant.

The allegations of the bill in this cause show that the agreement for the sale of this land was certain, mutual, not hard nor unconscientious, and that there was a valuable consideration for the contract; appellant having gone to the expense of obtaining an abstract of title and refusing to rerent the property which he was at the time occupying as a tenant; under which circumstances the bill is certainly maintainable.

This is one more instance in which demurrers have been sustained by the court where the pleadings demurred to charge fraud and where there were no answers denying the allegations of fraud, although this honorable court has from time to time repeatedly declared that a demurrer to a bill charging fraud will be overruled unless there is some answer denying the allegations of fraud.

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The chancellor was misled by the case of *Stigler* v. *Jaap,* 83 Miss., 351 (s.c., 35 South. Rep., 948). He held that case to apply to the case at bar, while the facts in the two cases are not at all similar.

In this case the contract was a contract for the sale of the lot in Shuqualak, evidenced by the written correspondence of Mrs. Williams and appellant, so that this contract is not obnoxious to the statute of frauds, but is enforceable if any contract is enforceable for the sale of land.

George Richardson, for appellees.

The bill in every instance alleges alternative propositions, and the agreements, as the court can readily see, are insufficient in any degree of certainty, and we submit that if the writings were as uncertain as the allegations of the bill, no court could enforce specific performance. A court of equity will only decree specific performance where the contract is in writing, is fair and certain in all its parts, and is for an adequate consideration, and capable of being performed, but not otherwise. *Boman* v. *Cunningham,* 78 Ala., 48. It must be reasonably certain as to its subject-matter, its stipulations, its purposes, its parties, and the circumstances under which it was made. 3 Pomeroy Eq. Jur., sec. 1405.

If the note or memorandum (or correspondence) shows only a treaty pending, and not a contract concluded, or if it annex any conditions or any variations, it has no effect as a memorandum to bind the parties from whom it proceeded. *Phillips* v. *Adams,* 7 Ala., 376.

No specific performance of the contract can be decreed in equity unless the contract be actually concluded and certain as to all of its parts. If the matter rest in treaty, or if the agreement is, in any material particular, uncertain or indefinite, equity will not interfere. Frye on Specific Performance, sec. 164 (*Ib.,* 202).

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In this instance there is no certainty with reference to the terms of the contract, no consideration passing from appellant to Mrs. Williams. The contract itself is not set out with any degree of accuracy, as it should have been in a case of this kind. Nor is there any correspondence set forth, nor anything by which the court could determine whether or not the agreement was without the statute of frauds.

TRULY, J., delivered the opinion of the court.

This is a bill to enforce specific performance of a contract for the sale of land. The contract which is averred to have been established by correspondence between the parties is as follows: "That, thereafter, and after further correspondence, complainant offered to purchase said land on the following terms—to wit, $700 cash, less the taxes and rent to January 1st, 1904 (defendant to have possession until January 1st, 1904)—which offer was made in writing now in possession of said defendant, and complainant in said writing proposed to purchase said land on another condition if the proposition hereinbefore mentioned was not accepted—to wit, $100 cash and $600 on the 1st of January, 1904, defendant to pay taxes on said land for the year 1903, and defendant to reserve the rents for the balance of the year 1903." The bill further avers that the defendant "unequivocally accepted the proposition of complainant, and unconditionally agreed with complainant that she would execute to him a deed to the property above described on the terms proposed." The court sustained a demurrer to the bill, and refused to enforce the performance of the agreement as set out above, and this action of the court is assigned as error.

The elementary general rule, as frequently enunciated in reference to the enforcement of specific performance of contracts, so far as relates to the particular branch of the subject here presented for consideration, is that the contract must be specific and distinct in its terms, plain and definite in its meaning, and must show with certainty that the minds of the parties

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had met and mutually agreed as to all its details upon the offer made, upon the one hand, and accepted, upon the other. If any of these requisites be lacking, specific performance will not be decreed by a court of equity. In our judgment the contract here sought to be enforced does not measure up to these requirements. The proposition which appellant avers was accepted by the defendant is in the alternative, embodying two distinctly different offers to purchase, and consequently, under the principle announced in *Everman* v. *Herndon,* 71 Miss., 830 (15 South. Rep., 135), the alleged contract is not sufficiently definite to warrant the interposition of a court of equity. It is impossible, accepting the language of the bill as set out, for any court to determine with any degree of certainty which of the two propositions would have finally been chosen by the vendor. Under this vague and indefinite statement, the court is without power to make a contract for the parties, where none appears with certainty to have been mutually assented to and agreed upon.

Decree is affirmed.

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INDIANOLA LIGHT, ICE AND COAL COMPANY ET AL. v. HUGH M. MONTGOMERY ET AL.

DEDICATION. *Streets. Extent. Acceptance.*

Where the owner impliedly dedicated a strip of land for a street by platting his land into lots and streets, making a map thereof and selling the lots as laid out on the map, the fact that the municipality, for more than ten years thereafter, used only a portion of the land designated as a street, did not deprive it of the right to use the entire strip for a street when necessary for the convenience of the public.

FROM the chancery court of Sunflower county.

HON. JULIAN C. WILSON, Chancellor.

Montgomery and another, appellees, were complainants in the court below; the Indianola, etc., Company, appellant, was

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defendant there. The suit was to confirm complainants' title to a small piece of land. The defense was predicated of the idea that the land in controversy constituted a part of a street in the town of Indianola. From a decree in complainants' favor the defendant appealed to the supreme court.

The town of Indianola is nearly square. About one-half of the town is south of Indian bayou, which runs east and west. On the south side of the bayou is the business part of the town, and on the north side is the residence portion of the town. On the south side of the bayou is Front street, running north and south up to a street running parallel with, and immediately on the banks of, the bayou. Front street, up to the bayou, is sixty-six feet wide. The lot in controversy is what would be included in the street extended across the bayou, except so much of it as is covered by a bridge over the bayou from north to south. The record shows a deraignment of title in appellees from the United States government, through mesne conveyances, to themselves. Appellants claim that the lot was dedicated as a street to the town of Indianola, and they claim by privileges granted by the town. The evidence shows that in 1881 the S. E. 1-4 section 31, township 19, range 4 W., of which the lot in controversy formed a part, was owned by G. K. Smith and others, and about that time a map was made by one Lusk, a surveyor, of a portion of this land, lying south of Indian bayou, dividing it into town lots, and on this map a street running north and south up to the south bank of the bayou was laid off, sixty-six feet wide, known as "Front street," and up to the southern boundary of the lot in controversy; that in 1883 the lot in controversy and other land were sold to P. Barnett by the then owners, but this particular lot was never sold to anybody until complainants purchased it in January, 1903, before this suit was filed, in May, 1903; that in 1888 G. K. Smith and others purchased the land lying north of Indian bayou, and caused a map to be made of it, and sold it as divided in the map, as town lots, and the residence portion of

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the town of Indianola was built there; that about this time a bridge sixteen feet wide was built across the bayou, the south end of which extended into Front street, and on the north side there was a vacant plot of land about one hundred and eighty feet wide, several streets intersecting at or near the north end of the bridge. The bridge was used all the time, after it was first erected, by the public, in crossing the bayou from north to south. The bridge was afterwards rebuilt and made twenty feet wide. It is contended for appellees that, as the public has used the bridge across the bayou for ten years, its right and title are limited to the actual land used for street purposes.

Johnson, Chapman & Neill, for appellants.

A right of way across the lot in question is conceded. Describing the property sued for, the bill excepts so much of the ground as is covered by the bridge. That the street known as Front street on the map, sixty-six feet wide, extends across the bayou is conceded. The only question in controversy is the width of the right of way across the bayou. Were this level ground, there would be no room for controversy; both authority and reason establish under the circumstances and facts in this case that the street would be at least sixty-six feet wide over the disputed territory. There might be a question as to whether it was merely sixty-six feet of uniform width or, commencing at sixty-six feet, would widen out to fit the surveyed plat on the north side of about one hundred and eighty feet. The ground where this way is located has been used for street purposes since the survey on both sides of the bayou. The plat and survey on the south side of the bayou was made in 1887; that on the north side of the bayou, in 1888. With the exception of the frame building erected by Cohn on the east side of where the bridge now stands, on the opposite side from the lot in controversy, and which stood from the year 1894 to the year 1896, there has never been any adverse occupation against the claim of the public as a street. The right of way being conceded, we

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ask, How is its width to be determined? It certainly could not be determined by the travel across it. On account of the condition of the ground, or maybe the mere fancy of the public, all the travel might be confined to one side of the lot, inside of a space of not over ten feet; but certainly the grant which is presumed from the long use would not be confined to this actual space trodden by the public. Where a right is gained by prescription, as in the case at bar, instead of by original grant, the theory of the law is that there was an original grant, which on account of its antiquity cannot be proven, and what we call prescription, long use, is but conclusive evidence of an original grant. Washburn on Easements, 130. A nonuser of a part of the street covered by an actual grant does not deprive the public of their right in it. See notes to 9, L. R. A., 94; *Briel* v. *Natchez,* 48 Miss., 436.

Harris & Powell, on the same side.

The difference in the contention of the two parties to this suit seems to be that appellees proceed on the ground that there has been no adverse actual occupation of the strip across the bayou, except as the same is occupied by the bridge, which is not true, while appellants contend that such actual occupation of the whole is not necessary, although actual occupation is shown by the evidence as to a large part of the property in controversy, because they claim by dedication as well as by adverse occupation. Dedication may be made in two ways: by express dedication or by deed or map, or by implied dedication, which is one arising by operation of law, from acts of the owner. "It may exist without any express grant, and need not be evidenced by any writing nor by any form of words, oral or written. It is not founded on a grant, nor does it necessarily presuppose one, but is founded on the doctrine of equitable estoppel. If the donor's acts are such as indicate an intention to appropriate the land to the public use, then upon acceptance by the public

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the dedication becomes complete." Elliott on Roads and Streets (2d ed.), 123, 124.

The whole question seems to resolve itself into what was the intention of the parties in making the various plats and surveys of the town both on the north and south side of the bayou. As a side light upon this subject the fact that the town widened the bridge several years ago to twenty-six feet without objection ought to be considered. Again, the property, though in the heart of the town, was not attempted to be conveyed for many years, and then only two months before the bringing of this suit. It was then evidently purchased to bring this suit and hold up the town. When Front street on the south side of the bayou was laid off, the town was a mile square and Front street ran up to the bridge, which was in the center of the town. The land on the north side was then owned by G. K. Smith, who dedicated the street and who manifestly intended to open up and sell, and who did a year after plat and sell, the land on the north side. Now is it possible that he only intended the street to be sixty-six feet wide up to the bridge and there shrink to a twenty-foot strip across the bayou? Streets are usually the same width throughout, and in the absence of proof the intention of a party dedicating a street must be presumed to have been to follow the usual custom. The public and the surveyors who platted and mapped the town indulged this view, that the street throughout was sixty-six feet wide, as is evident from the map on file, and the testimony in the case, notably of Welsh. The town evidently believed that the street extended across the bayou the full width, because it widened the bridge and granted rights of way to the telephone company and electric light company on each side of the bridge and forced Cohn to move back his house to the sixty-six foot line. The original owners of the strip evidently concurred in this idea, because they made no objection to the widening of the bridge or the occupancy of the strip by the telephone and electric light companies.

The fact that the town did not occupy the whole of the street

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at the time of the dedication cuts no figure in this case, because it is shown by the proof that the land was swampy and the whole street was not necessary at that time. As to the time when the street should be opened, the local authorities are the judges. Roads and Streets by Elliott (2d ed.), sec. 118, and note 4, and cases there cited. The case of *Potts* v. *Canton Warehouse Company,* 70 Miss., 462, is decisive of this case, especially the opinion of Judge Campbell on suggestion of error.

McClurg & Gardner, on the same side.

This cause is a life struggle between progress and avarice, between the spirit of public advancement and sordid greed for private gain, between an unpatriotic effort to block and cramp the public convenience and natural growth of the community at the subservience of individual interest; a speculative purchase of a narrow, ill-shaped strip of land in the bottom of Indian bayou from ten to fifteen feet average below the surface level and the greater portion of the year under water. Not denying the right of honorable men to create and press such contests, yet this strip of low, submerged land in the very heart of a town that is sure to become a city of no mean proportions is the subject of this litigation. The fact that it has a present value and prospect is self-evident of the hope of the town and the public need of this strip in the future.

The record discloses a cessation of conveyances of this strip from the surveying and platting of that portion of the town north of the bayou in 1888 to the date of the deed originating this controversy, clearly indicating a purpose in the mind of the original owner to dedicate it to the public use; and the building and use of the first bridge sixteen feet wide, and subsequently of the bridge twenty feet wide, both by the county, was an acceptance of the donation, or dedication, of the whole strip lying sixty-six feet between the east boundary of the street to the west boundary thereof all the way across the bayou—surely an extension of the street.

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If the owner of lands makes a plat of a city or town, including streets, he must be taken to mean public urban ways in all the term implies. He sets apart, by such act, the land indicated as a street to all public uses to which a public urban way may be properly appropriated. The owners in this case divided by the sub-section line had a common purpose to build a town or a city as marked out by the act of incorporation and surveys and platting, with streets, avenues, and alleys. That common purpose of the original owners, understood, accepted, and acted upon by men who bought lots and built business houses on the south side and bought lots and built residences on the north side of the bayou, is not now to be destroyed by a narrow technical view; all doubts will be resolved in their favor. Elliott on Roads and Streets (2d ed.), 17, 18; *Kinnare* v. *Gregory,* 55 Miss., 612; *Harrison County* v. *Seal,* 66 Miss., 129; *Sanford* v. *Meridian,* 52 Miss., 383; *Vicksburg* v. *Marshall,* 59 Miss., 563; *Briel* v. *Natchez,* 48 Miss., 423; *Theobold* v. *Railroad Co.,* 66 Miss., 279.

Baker & Chapman, and *Edward Mayes,* for appellees.

In view of the fact that appellees have shown a perfect title in themselves, the only question presented for decision is, Does the evidence show a dedication of all or any part of the lot in controversy as a street?

It was not in the court below, nor do we suppose that it will be here, seriously contended that the public used any of the lot in controversy as a street for the statutory period of ten years. In fact, the record conclusively shows that the only land used by the public for that period was the land on which the bridge is located. It is true that there is some evidence of the occasional use of land near the center of the bayou east and west of the bridge, but exactly what part of the lot in controversy was used is not shown. *Lanier* v. *Boothe,* 50 Miss., 410, 416, In fact, there is very serious doubt if it was ever used at all after the bridge was built. The court below found that it

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was not so used, and on all other questions where there was conflict in the evidence the chancellor found in favor of appellees, and we now submit that his findings on these facts are analogous to the verdict of a jury. *Davis* v. *Richardson,* 45 Miss., 499; *Apple* v. *Genong,* 47 Miss., 189; *Harrington* v. *Allen,* 48 Miss., 492; *Wilson* v. *Beauchamp,* 50 Miss., 24.

It is nowhere conceded that the street known as Front street, shown on Lusk's map to be sixty-six feet wide, extends across the bayou, but all the evidence in the case shows absolutely that this sixty-six foot street does not extend across said bayou. Counsel for appellants do not cite any authority nor show any good reason why the street over the disputed territory would be at least sixty-six feet wide if the ground were level.

The only title or right which appellants assert to the lot in controversy is an easement or right of way under the doctrine of prescription, but it is well settled "that the burden of proving an easement by prescription is upon the party who claims the easement." 22 Am. & Eng. Ency. Law, 1216. This same rule applies to highways acquired by prescription. 22 Am. & Eng. Ency. Law, 1225. Appellants have absolutely failed to show a dedication of any part of the lot in controversy; but even should it be conceded that the testimony is conflicting in reference to this proof, we do not believe that the right in appellants would be sufficiently established over the lot in controversy, because "where the evidence as to the acquirement of an easement by prescription is conflicting, the question whether or not it has been so acquired is for the jury." 22 Am. & Eng. Ency. Law, 1217. And as the chancellor found these facts in favor of appellees, we do not believe the case will be reversed unless it be shown that these facts are opposed to the preponderance of the testimony.

Argued orally by *Eugene Johnson,* and *Robert Powell,* for appellant, and by *Edward Mayes,* for appellees.

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WHITFIELD, C. J., delivered the opinion of the court.

The testimony clearly and manifestly establishes the implied dedication of Front street across Indian bayou, with a width of sixty-six feet. It was not necessary that the city should actually use the whole width of the street when the bridge was built originally or later. How much of the sixty-six feet should be used was for the city to determine, according to the city's development and growth. It is not imperative in the case of an implied dedication of a street that the city shall immediately enter upon actual use of the street throughout its whole length and width. As said in *Marion* v. *Skillman* (Ind. Sup.), 26 N. E., 676 (11 L. R. A., 59): "The inference of an intention to dedicate would not be simply to dedicate that portion upon which there was actual travel, but would evidence the intention of the owners that Branson street was to be continued across their land." Citing *Bartlett* v. *Beardmore,* 74 Wis., 485 (43 N. W., 492); *Sprague* v. *Wait,* 17 Pick., 309; *Hannum* v. *Belchertown,* 19 Pick., 311; *Simmons* v. *Cornell,* 1 R. I., 519; *Cleveland* v. *Cleveland,* 12 Wend., 172. See also note to this case. The true doctrine is very well stated by Simrall, J., in *Briel* v. *Natchez,* 48 Miss., at page 435, which we quote, to approve and reaffirm: "Nor is it necessary, in order to manifest a ratification or acceptance of the dedication, that the municipal authorities should presently open the streets. That may be postponed until the advancing population and private improvements make it necessary. 1 Wend., 487. Dedication of private property to the public enjoyment must always be considered with reference to the use to which the thing is to be appropriated, whether the easement is of a highway, a street, a common, or a park. All rest upon the same general doctrine. Nor is it necessary that there should be user following closely upon the dedication, as where streets are extended over suburban property. It may be years before the convenience of the public, or of those who live upon adjacent lots, on account of the paucity of population, requires that they

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should be formally taken in charge by the municipal authorities. Such dedication of streets in a growing town must have such an interpretation as will comport with the common understanding. The proprietor of the ground ought to be held as proclaiming and offering to the public to change his property from rural to urban, to sell it in small parcels with reference to streets and squares. Because the neighborhood is not rapidly settled up, and years may elapse before the city undertakes to work and grade the streets, or before the necessity arises, the city should not, by such nonuser, be held to have relinquished the easement and abandoned its acceptance of the dedication."

The decree is reversed and cause remanded.

GULF & SHIP ISLAND RAILROAD COMPANY v. SIMEON S. BOSWELL.

1. SUPREME COURT PRACTICE. *Instructions. Striking from record. Filing. Identifying. Code* 1892, § 732.

   Where a number of instructions, each having been acted upon by the judge, were attached together and filed by the clerk on the back of a common wrapper, they will not, nor will any one of them, be striken from the record by the supreme court because each particular piece of paper containing an instruction was not separately marked and filed, on the claim that Code 1892, § 732, regulating the filing of instructions so as to make them a part of the record, had not been complied with.

2. SAME. *Appellants estopped by own instructions.*

   Where an appellant asked for and was given an instruction propounding a legal proposition as applicable to the case, he cannot complain of an instruction for the appellee because it propounds the same proposition.

3. RAILROADS. *Licensees. Punitive damages.*

   Where, in an action against a railroad for injuries to a licensee in a freight car, an instruction on punitive damages was granted plaintiff which was correctly phrased, the supreme court cannot determine, in the absence of a record containing the facts, whether or not defendant was prejudiced thereby.

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4. SAME.

Where, in an action for injuries to a licensee in a railroad car, the statement in the declaration of the injuries inflicted if true would warrant a recovery of compensatory damages in an amount exceeding the verdict, an objection, on appeal, that punitive damages were improperly awarded will not be considered in the absence of all evidence.

FROM the circuit court of Simpson county.

HON. JOHN R. ENOCHS, Judge.

Boswell, the appellee, was plaintiff, and the railroad company, appellant, was defendant in the court below. From a judgment in plaintiff's favor the defendant appealed to the supreme court.

The declaration alleges that "plaintiff was rightfully on one of defendant's detached freight cars by invitation and permission of defendant, removing and unloading some lumber from said car, which was then on defendant's side track in the town of Mendenhall, where it had been placed by defendant for the purpose of enabling plaintiff to remove the lumber, when defendant's servants in charge of a certain locomotive and train of cars recklessly, grossly, negligently, and unlawfully ran said train of cars suddenly and violently against the detached car in which plaintiff was, throwing him off onto the ground with great force; and greatly hurt, bruised, and permanently injured plaintiff in body and limb, whereby plaintiff suffered and sustained great physical and mental anguish, and other inconveniences and deprivations, to plaintiff's damage $5,000." On motion of appellee the stenographer's notes, containing the only showing of the evidence, were stricken from the record. Appellee also made a motion to strike out the instructions in the case, because, as was charged in the motion, § 732, Code 1892, had not been complied with, and there was no bill of exceptions making the instructions given and refused in the case part of the record. By agreement the original papers of the circuit court were sent up for inspection by the court. These papers disclose the following facts in regard to the in-

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structions: All the instructions asked for and given for plaintiff were pinned together, and at the bottom of each instruction the word "Given" was written. There was a blank sheet of paper attached to the back of the instructions, and on it was written: "Filed April 20th, 1904. J. C. Smith, Clerk." The instructions refused for defendant were each written on separate pieces of paper, and at the bottom of each was written the word "Refused." These instructions were also bound together, and a blank sheet of paper attached, on the back of which was written: "Filed April 20th, 1904. J. C. Smith, Clerk." The instructions given for defendant were each on a separate sheet of paper, and were all bound together. At the bottom of each was written the word "Given." Some of them were marked "Filed" at the bottom by the clerk, and others were not so marked, but there was written on the back of the last one the style of the case and the number and the words: "Filed April 20th, 1904. J. C. Smith, Clerk." The opinion of the court contains a statement of such other facts as are necessary for a full understanding of the case.

McWillie & Thompson, James H. Neville, and *E. J. Bowers,* for appellant.

1. Under the declaration in this case and the facts stated therein the plaintiff was in a freight car standing upon a side track, and was rightfully there for the purpose of unloading lumber from the car; and, this being true, we propound the proposition that Code 1892, § 3549, has no application.

We are, of course, familiar with the cases of *Illinois, etc., R. R. Co.* v. *McCalip,* 76 Miss., 360, and *Yazoo, etc., R. R. Co.* v. *Metcalf,* 84 Miss. (s.c., 36 South. Rep., 259), but neither of said cases presented for adjudciation the question here presented, which question is: Does the statute apply to a person who is in a car of the company at the time?

Surely the statute was intended only for the protection of persons who, and property which, might be upon the railroad

tracks. The means provided by the statute for the protection of those within its contemplation, "a servant on foot, preceding the backing train, not exceeding forty nor under twenty feet in advance, to give warning," show that persons in the cars were not in the legislative mind when the statute was adopted.

If Code 1892, § 3549, has no application to persons receiving injuries while in the cars of the railroad company, and consequently none to the case made by the declaration, then it follows, even in the absence of the evidence, that two of the instructions given to plaintiff by the court below are erroneous.

2. The first instruction given for the plaintiff is erroneous and should not have been given under any conceivable state of case, and it ought, we think, to cause a reversal of the judgment appealed from, even should this court strike out the stenographer's report of the evidence.

The objection to this instruction would apply to any action of trespass for damages to the person, no matter what the evidence might be, and that objection is that the instruction does not confine the jury in estimating damages to the evidence, but turns them loose to assess damages without reference to the proof. *Yazoo, etc., R. R. Co.* v. *Smith,* 82 Miss., 656.

3. The second of the instructions asked by defendant, and which the court refused, ought not to have been refused in an action of trespass under any conceivable state of evidence. That instruction was in these words:

"Before the plaintiff is entitled to recover a verdict against the defendant, it is incumbent on him to make out a case by a preponderance of the evidence."

Is not this true of all actions of trespass? Most certainly it is. While the declaration in the case averred an injury to plaintiff "inflicted by the running of the locomotives and cars of (the railroad) such company," and proof of being so injured would have made out a *prima facie* case, under Code 1892, § 1808; yet the instruction should have been given, because before the aid of the statute could have been invoked it was

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incumbent on the plaintiff "to make out a case by a preponderance of the evidence," in the language of the instruction, showing that he had been so injured. The instruction surely ought to have been given, although plaintiff would, upon asking it, have been entitled to a counter one applying the statute, if the jury believed from the evidence plaintiff had shown by a preponderance of the evidence that he had been injured by the running of the locomotives or cars of the company. The fact that three of the instructions given for the plaintiff authorized action by the jury without regard to the evidence makes the effect of refusing the instruction under consideration especially prejudicial. The rule which will reverse, in the absence of the evidence, because of the giving of an instruction which should not have been given under any state of the evidence must apply to the refusal of an instruction which ought to have been given upon every conceivable state of facts. *Chrestman* v. *Russell,* 73 Miss., 452.

The sixth instruction given for plaintiff has no application to the case made by the declaration. The great weight of authority maintains the proposition that where the statute does not specifically designate the class to whom the duty of giving crossing signals is owing, it is due only to those who are about to use, or are using, or have lately used, the crossing, and that others cannot recover for injuries resulting from a failure to give the signals. *Pike* v. *Chicago, etc., R. R. Co.,* 39 Fed. Rep., 754; *Clark* v. *Missouri Pacific Ry. Co.,* 35 Kan., 350; *East Tennessee, etc., R. R. Co* v. *Feathers,* 10 Lea (Tenn.), 103; *Reynolds* v. *Great Northern, etc., R. R. Co.,* 69 Fed. Rep., 808; *Bell* v. *Hannibal, etc., R. R. Co.,* 72 Mo., 50; *Elwood* v. *New York, etc., Ry. Co.,* 4 Hum., (N. Y.), 808; *Harty* v. *Central, etc., R. R. Co.,* 42 N. Y., 468; *O'Donnell* v. *Providence, etc., R. R. Co.,* 6 R. I., 211, 216; *Ransom* v. *Chicago, etc., R. R. Co.,* 62 Wis., 178 (s.c., 51 Am. St. Rep., 718, and note); *Williams* v. *Chicago, etc., R. R. Co.,* 135 Ill., 491.

It was prejudicial error, therefore, for the court below, under

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the case made by the declaration, to have given said instruction, because the statute of which it was predicated had no application to the case.

Green & Green, and *S. L. McLaurin,* for appellee.

Counsel's first proposition that § 3549, Code 1892, has no application, conceding for argument's sake the question is before this court, cannot be here raised on the theory that *communis error facit jus,* because in the second instruction that appellant asked for this was there: "Or with reference to rate of backing in more than three miles an hour or with reference to being preceded by a person on foot." If the same was not applicable, why ask the court to apply the same to the instant case? And, the court having acceded to the request of the appellant and given the law based on the statute as requested, the appellant cannot complain, as the court has done nothing more than he requested.

Not content with the same in the second instruction, the court is asked by the appellant to tell the jury to find for the defendant "unless they further believe from the evidence that in coming into said side track they were operating their train in violation of the law with reference to the rate of speed they should run in incorporated towns or backing more than three miles an hour, or with reference to being preceded by a person on foot, or with reference to sounding its whistle or ringing the bell." The appellant actually requests the court to inform the jury that they will find for the appellee if the appellant violated the law in reference to this very section, quoted nearly literally from the statute, and the appellant had the jury to be told that if the appellant was doing this very thing, its act in doing so was illegal and that it was liable because thereof. Now it cannot complain.

In the eleventh instruction given for the appellant, appellant concedes its liability on the terms that the injury came about "while backing into said side track they were violating the law,

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with reference to the rate of speed, in backing into or along a passenger depot, or with reference to having a person on foot preceding the backing train." *Van Oss* v. *Insurance Co.,* 63 Miss., 431; *Clusby* v. *Railroad Co.,* 78 Miss., 948.

Learned counsel try to invoke the rule of the case of *Railroad Co.* v. *Smith,* 82 Miss., 658, but the same is entirely inapplicable to the case at bar. It is true that it is the province of the jury to assess the damages and that the jury are the sole judges of the facts in assessing the same. That is elementary law, but the instructions do not contain the element that the court condemned in the Smith case. The jury are merely instructed that, having established the liability of the plaintiff for the injury, when they pass on the amount of damages their judgment in regard thereto is conclusive.

Appellant cannot complain of the alleged error arising from the giving of the instruction about the ringing of the bell and the blowing of the whistle, because as shown *supra* having invoked the same rule of law in the instructions that were given for it, it cannot assail the same as incorrect when given for the other party.

Argued orally by *R. H. Thompson,* for appellant, and by *Marcellus Green,* for appellee.

TRULY, J., delivered the opinion of the court.

Under the facts of this record as disclosed by the original papers we think the contention of appellee that we should not consider the assignment of error based upon the action of the court in granting and refusing instructions because the instructions are not marked and filed in conformity with the statute, nor embodied in a special bill of exceptions, is unsound. The original papers show that the instructions were in some manner so marked as to show that they were acted upon by the court and filed by the clerk. We think the argument that each particular piece of paper containing an instruction must be separately marked and filed by the clerk too narrow a construction

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of the law. This case is plainly distinguishable from *Swann* v. *West,* 41 Miss., 104. In that case, as we gather from the report, there was no way to show that the instructions were, in truth, properly a part of the record. In any other view the decision in that case would not be maintainable. In the instant case all of the instructions are either attached one to another, and thus marked and filed, or each contains a notation of some character sufficient to show the action thereon by the court and the filing thereof by the clerk.

But when we consider the record as presented, the stenographer's notes already having been stricken out, we are unable to say that any fatal error was committed on the trial below. The argument of appellant that some of the instructions granted for the appellee were not proper under any state of case, and that some of the instructions refused appellant should have been granted in every state of case, even if granted, in no way assists us in solving the question whether or not material error was committed. In the absence of anything in the record to demonstrate that wrong was done the appellant, we must presume, under the well-settled doctrine, when no specific error is indicated, that the jury followed the instructions which were properly granted, and that the right result was reached.

Again, as to several of the instructions which appellant strenuously urges announce inapplicable principles of law, we find that the same propositions are propounded by the instructions which it asked for and received. Thus the appellant contends that the rules of law announced by § § 3546–3549, Code 1892, were not properly applicable to the case at bar; and yet we find that the second instruction requested and granted appellant in the court below charged the jury that, if they believed certain facts in evidence were true, then the railroad company was not liable, unless they should further believe that its employes "were operating their trains in violation of the law with reference to the rate of speed they should run in an incorporated town, or with reference to the rate of backing in more than

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three miles an hour, or with reference to being preceded by a person on foot, or with reference to sounding its whistle or ringing its bell." To the same effect are the third and eleventh instructions granted the appellant. This was an express recognition of the applicability of the legal propositions stated therein, and appellant cannot now be heard to dispute or deny their correctness. To allow this would permit a litigant to contest a case in the trial court on one theory, and, if unsuccessful there, secure in the appellate court a reversal of the judgment because of error in the legal principle which he had himself invoked, or at least acquiesced in, as being both correct and applicable. To show the absolute justice of this conclusion it need only be noted that in the instant case the soundness of the several propositions here attacked was neither doubted nor denied in the court below, the appellant in no instance asking the court to instruct that any one of the code sections cited was not applicable to the case there made. If there was error in the ruling of the court in refusing any of the instructions denied the appellant, it is not so glaring as to be plainly apparent from an inspection of the bare record, the notes of the evidence being lacking.

The instruction authorizing the allowance of punitive damages if the jury believe in the existence of a certain statement of facts being correctly phrased, we are unable to state that the granting of the instruction was not warranted by the proof, or, if unwarranted, that it was prejudicial to the rights of appellant. We are without proof as to the extent of the injury suffered or the circumstances under which it was inflicted; and, being so without proof, we cannot say that the jury awarded any punitive damages. If we refer to the declaration for a statement of the injuries inflicted, and accept that statement, the amount awarded is manifestly not excessive, even though appellee had been restricted to the recovery of purely compensatory damages.

We are unable to say with any degree of confidence that any

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error prejudicial to appellant was committed or that the result reached is not in accordance with law and justice, and under such circumstances the judgment must be affirmed.

Affirmed.

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NORTH BRITISH AND MERCANTILE INSURANCE COMPANY OF LONDON AND EDINBORO *v.* WILLIAM EDWARDS.

1. CONSTITUTIONAL LAW. *Constitution* 1890, *sec.* 97. *Reviving barred remedy. Contractual limitation.*

   Constitution 1890, sec. 97, prohibiting the legislature to revive any remedy which may have been barred by lapse of time, or by any statute of limitation of this state, has no application to the terms of a contract by which the parties agree that an action shall not be brought thereon after a specified time, but relates wholly to such limitation of time in which suits may be brought as is recognized by the law of the state.

2. PRIVILEGE TAXES. *Delinquency. Disability to sue. Code* 1892, § 3401. *Amnesty act. Laws* 1904, *ch.* 75, *p.* 57.

   Parties who were disabled to maintain suits, under Code 1892, § 3401, because of delinquency in the payment of privilege taxes, could avail of the amnesty act of 1904 (Laws 1904, ch. 75, p. 57), and remove such disability where suit was pending when the act was passed, although the contract of fire insurance sued upon provided that no suit could be maintained upon it unless instituted within one year from the fire and more than a year had elapsed between the date of the fire and passage of the amnesty act.

FROM the circuit court of Oktibbeha county.

HON. EUGENE O. SYKES, Judge.

Edwards, the appellee, was plaintiff, and the insurance company, the appellant, defendant in the court below. From a judgment in plaintiff's favor the defendant appealed to the supreme court.

Appellant issued a fire insurance policy on a storehouse and stock of goods belonging to appellee in Sturgis, Miss., which was destroyed by fire on the night of the 30th of January, 1902, while the policy was in force. This is a suit brought by appel-

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lee against appellant to recover the sum of $1,900 on this policy. The suit was filed December 1, 1902. The policy contained a provision that no suit should be maintained on it unless brought within twelve months after the fire. There were two counts to the declaration—the first, for the building and store fixtures; the second, for the stock of goods. The suit was returnable to the May term, 1903. Defendant pleaded the general issue. As to the second count, it pleaded the failure of plaintiff to pay his privilege tax, and the contractual limitation of twelve months after the fire, and its breach. There were a number of other pleas, but the view taken of the case by the court renders it unnecessary to set them out. Plaintiff replied to the plea of failure to pay privilege tax by confessing the plea, and avoiding by averring that an amnesty act was passed by the legislature in 1904 (Acts 1904, p. 57, ch. 75), and a compliance therewith by plaintiff by payment of the amount therein prescribed. Defendant demurred to this replication, assigning the following causes of demurrer: No answer to the plea. If the act of 1904 is valid, it could validate the contract only as of the date of its passage, January 28, 1904, and could not affect defendant's plea in this suit, pending at the time of its passage. If valid, the act applies only to suits brought after its passage. It purports to apply to contracts made within four years of its passage, and is therefore an amendment of ch. 46, p. 48, Acts 1900, and, as such, violates sec. 61, Constitution 1890. It violates sec. 112 of the constitution, because not equal and uniform. It violates sec. 87 of the constitution, because it suspends a general law for the benefit of individuals and corporations. It violates sec. 97 of the constitution, in that at the time of its passage the cause of action was void, and the remedy was barred by the twelve months' contractual limitation of the policy, and the act undertakes to revive this remedy. The remedy was barred by the contractual limitation in the policy before the passage of the act. The demurrer was overruled. Defendant then rejoined that the failure to pay the privilege tax, under the statute, made

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the policy, as to the stock of goods, null and void, and made suit not maintainable thereon; that when this suit was brought, and up to the passage of the act of 1904, no suit was maintainable on the policy; that the policy provides that no suit can be maintained unless brought within twelve months after the fire; that said act was not passed until more than twelve months after the fire; that, under sec. 97, Constitution 1890, the legislature had no power to pass said act, to make it applicable to the contract sued on; and that the judgment of the court in giving effect to said act, contrary to the contractual limitation in the policy, impairs the obligation of defendant's contract, and deprives defendant of its property without due process of law, contrary to the federal constitution. A demurrer was sustained to this rejoinder, and judgment final as to the privilege tax plea was rendered. Issues were made up on other pleas, and a trial was had, which resulted in a verdict and judgment for plaintiff for the amount sued for. Defendant's motion for a new trial was overruled.

Green & Green, for appellant.

The court erred in overruling defendant's demurrer to the replication setting up the amnesty act of 1904, in confession, and avoidance of the failure to pay the privilege tax.

Under § 3401, Code 1892, Acts 1898, pp. 29, 30, "all contracts made with any person who shall violate the provisions of this chapter . . . shall be null and void, so far as such person may base any claim upon them, and a suit shall not be maintainable in favor of any such person on any such contract."

The statute makes the contracts void, and its repeal does not make such contracts valid. *Anding* v. *Levy,* 57 Miss., 51; *Decell* v. *Lewenthal,* 57 Miss., 331.

A policy of insurance is a contract within the statute. *Pollard* v. *Insurance Co.,* 63 Miss., 244.

When this suit was brought in 1902 upon this policy, the policy as to the stock of goods was void, and a suit or remedy

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thereon was prohibited. In this condition of affairs the defendant pleaded the failure to pay the privilege tax, and that plea was a complete bar to the maintenance of the suit. When this plea was confessed, the court was shown that this failure existed and that it could proceed no further with the suit; there was and could be no suit maintained on such a contract.

In 1904, about three years after the fire, and when the contractual limitation of twelve months in the policy had barred any suit, the legislature passed the act of 1904, whereby the effect of the prohibition of this general act was to be removed, and the contracts when void and without remedy therein were to be made valid and enforceable.

Construing this act of 1904 we find it retroacts for four years, and thereby is an amendment to ch. 46, Acts 1900, and as such amendment it violates sec. 60, Constitution 1890. *Hunt* v. *Wright,* 70 Miss., 298; *Nations* v. *Lovejoy,* 80 Miss., 402.

The act is plainly prospective in its operation, and when complied with should then, *in presenti,* give a remedy on the contract. Its language would not imply that it would, retroactively, apply the remedy thus created to a then pending suit. There is, then, no remedy on this contract. *Crum* v. *Carrington,* 72 Miss., 458.

If the act shall be interpreted as creating a remedy in the then existing suit, then such suit could have existence in the eye of the law only from the passage of the act. No suit was maintainable up to that time. Legally, no suit could or did exist. The result would be that suit then for the first time brought was barred by the twelve months contractual limitation in the policy. *Ohio* v. *Insurance Co.,* 65 Miss., 532; *Ward* v. *Insurance Co.,* 82 Miss., 129.

The remedy on this contract being barred by the said contractual limitation when the act of 1904 was passed, it was beyond the power of the legislature to create a remedy because of sec. 97, Constitution 1890.

It is to be noted that this constitutional provision covers two

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classes: those remedies which may have become barred by lapse of time, or by any statute of limitation of this state. Under this first class would clearly fall contractual limitation in contracts.

Carroll & Magruder, for appellee.

This appeal is altogether lacking in any substantial merit, and its consideration involves nothing but refined technicalities. The appellant, defendant below, in its second plea alleged nonpayment of privilege tax upon the part of the plaintiff. This second plea, when originally filed, was a general plea to the whole declaration, but was amended by consent after the plaintiff's replications had been filed, so as to apply only to the second count of the declaration. The plaintiff's second replication sets up the passage by the legislature of the said amnesty bill and the compliance of the plaintiff therewith. To this replication the defendant demurred.

It is contended by the distinguished counsel for the appellee that the act of 1904 can in any event be applied only to suits brought after its passage. This position is untenable. Any such hypercritical construction of the acts of 1904 does violence to its unmistakable terms. Ch. 35 of the said acts declares in emphatic words that "any and all" contracts of this nature may be validated by compliance with its provisions. The demurrer admits everything, and the appellant's position is simply an effort to make "any and all' mean something else. Appellant demands that this court must write into the act the qualification: "Except where suits are now pending." The legislature would have made this exception if, in their judgment, it had been thought advisable; but they saw no good reason why any exception or distinction should be made, and that is an end of the matter. There have been six amnesty bills since the annotated code was adopted, covering each session of the legisature, with the exception of 1898. The first of these six bills is to be found in ch. 25, Acts 1894. It did not

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apply to "any and all" contracts, but only to "contracts," and excepted those cases where "actions or suits are pending involving such contracts in any court of law or equity."

Ch. 39, Acts 1896, clearly manifests upon the part of the legislature a more liberal policy, among other extensions of the amnesty being its application to "all contracts." Ch. 8, Acts 1897, uses the same language in this respect. Ch. 46, Acts 1900, is still more emphatic, and says in good, plain old Anglo-Saxon, "any and all contracts." Ch. 55, Acts 1902, follows with the same words, "any and all contracts." Thus the legislature of 1904 had these legislative precedents before it. Should its amnesty be extended to "any and all contracts" in accordance with the policy of recent years, or should it go back to the acts of 1894, reaching only that limited class of contracts not pending in litigation?

Sec. 97, Constitution 1890, has for at least two distinct reasons no applicability to the chapter in question or to this case with reference thereto. Sec. 97 of the constitution evidently refers to statutes of limitation of this state or to a lapse of time similar thereto, as of some federal limitation applicable in this state. It clearly has no reference whatever to some special, contractual limitation provided between individual persons. Not only this; the act in question does not "revive any remedy." It only removes a barrier previously interposed by the state against the enforcement of a contract. The contract was not dead; it did not have to be revived; the remedy thereunder was not dead under the familiar principle that for every right there is a remedy. It may be true that in a certain course of procedure the remedy could not be asserted, but it still existed with virility and force, but suspended from enforcement. If the defendant company had sought to enjoin the collection of the policy upon the ground of non-payment of privilege tax, it would have been speedily discovered whether or not the contract and the remedy thereunder were dead.

A further conclusive reply to this contention is that the

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twelve months' contractual limitation is not a limitation upon the amendment of the suit, upon the right to plead *puis darrein continuance* upon the assertion of a particular right of remedy in the course of the suit, but upon the bringing of the suit itself.

The only contractual limitation in the policy (and being in derogation of our statutory limitation, it should be strictly construed) is that the suit must be commenced within the twelve months after the fire. As the court says in *Ward* v. *Insurance Co.,* 82 Miss., 124: "In other words, the action which must be brought within the specified time is the action which shall afterwards be prosecuted to judgment." This is the only limitation in the policy, and it is a captious contention that seeks to apply this limitation to the successive developments of the case. The difficulty arises from the confusion of the commencement of a suit with the incidents of a suit after it has been instituted.

Argued orally by *Marcellus Green,* for appellant, and by *W. W. Magruder,* for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

The provision of sec. 97 of the constitution of 1890 in respect to reviving a remedy relates alone either to an express statute of limitation of this state or to a lapse of time dealt with, under the statute or under the general law, as a limitation of time. The phrase "lapse of time," as here used, must be interpreted to mean—on the maxim, *"Noscitur a sociis"*—a period of time limiting the action. The statute providing that no action could be maintained on any contract in a business where the privilege license had not been paid does not provide any statute of limitation within which the remedy must be pursued. It sets up an absolute bar, while it exists, to the right of recovery at all. It is a bar to recovery which the state has interposed between itself and a delinquent taxpayer, effectual without reference to the time, so long as the statute is unmodified. In other words, the provision of sec. 97 of the constitution relates wholly to a limitation of time in which suits may be brought,

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and to such limitation as is recognized by the law of this state. The statutory provision prohibiting the maintenance of suits relates not at all to such limitation of time, but provides an absolute bar to the right to recovery while the statute is in force. Sec. 97 of the constitution, therefore, is in no way interfered with by the amnesty act. The amnesty act, as held in the Pollard insurance case, 63 Miss., 244 (56 Am. St. Rep., 805), simply removes the barrier the state had set up between itself and a delinquent taxpayer. The clause in the policy of insurance is a contractual limitation made between private parties, not a limitation existing under the statute of limitation or under the general law. The inherent difference in the nature of the two things—the contractual provision in the policy and § 3401, Code 1892—solves all the trouble. The former relates alone to remedy, and to that feature of the remedy constituting the time in which suit may be brought. Sec. 3401, Code 1892, relates not at all to any limitation of time in which a suit may be brought, but to a wholly different thing—to wit, an absolute bar to a right to recovery at all which is by it set up. The argument is that during the time § 3401, Code 1892, was in force, no suit could be commenced on this contract—legally commenced—in other words, that there could be no legal commencement of such suit until after the amnesty act had been passed, and hence, as that act was not passed until after the expiration of the period of time within which plaintiff, by virtue of the contractual provisions in the policy, might sue, had expired, the plaintiff was barred. What we have said clearly disposes of this contention. The insurance company, because the state sets up a bar to the right of recovery at all, and afterwards sees fit to remove it as between itself and the delinquent taxpayer, derives from such legislation, not relating at all to a limitation of time, no right to claim that the suit has been barred by virtue of the contractual provision. So far as the insurance company is concerned, the suit was legally instituted. The institution of the suit is one thing; recovery under it is another. An in-

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surance company cannot avail itself of this sort of statute; § 3401, Code 1892, passed for the purpose we have stated, not relating to limitation of time at all, as an aid to its contractual provision, which relates to time alone.

There is no merit in any of the other contentions.

Affirmed.

JOSEPH MONTGOMERY *v.* STATE OF MISSISSIPPI.

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1. CRIMINAL LAW. *Continuance. Absent witness. Compulsory process.*

   Under Code 1892, § 1425, regulating the subject, where a defendant in a criminal case had not had opportunity to obtain compulsory process for a witness on account of whose absence he desired a continuance, and the facts which he expected to prove by him were material to the defense, and such process would probably have secured his presence, it was error not to have continued the case, or postponed it to another day, although the prosecuting attorney admitted that the witness, if present, would have testified as shown in the affidavit.

2. SAME. *Assault with intent to kill. Assault and battery with intent to kill. Code* 1892, § 967. *Instruction. Counts in indictment.*

   Where a defendant was charged, under Code 1892, § 967, in one count with an assault with intent to kill and murder, and in another count of the same indictment with an assault and battery with like intent, and there was no evidence of the battery, it was error to instruct the jury, generally, that the want of such evidence was immaterial, drawing no distinction between the counts of the indictment.

3. SAME. *Practice. Time of granting instructions.*

   The proper time for granting instructions is after the close of the evidence and before the argument of the case. While the court has the right to grant an instruction at any time before the jury retires, it should not be done after argument is commenced, except on rare and emergent occasions and with opportunity to the other party to prepare and request counter charges.

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4. SAME.

The procuring of an instruction in a criminal case from the court during the argument for defendant, whose counsel had no notice thereof until it was produced for the first time during the closing argument for the state, was error, though on objection the state's attorney offered to permit defendant's counsel then to answer it.

FROM the circuit court of, first district, Hinds county.

HON. DAVID M. MILLER, Judge.

Montgomery, the appellant, was indicted, tried, and convicted of an assault with intent to kill and murder, or of an assault and battery with like intent, both crimes being charged in the indictment and a general verdict of guilty being rendered. From this conviction he appealed to the supreme court.

When the case was called for trial, two of defendant's witnesses were absent who had been duly subpœnaed. He made an application for a continuance, based upon an affidavit that he expected to prove by one of the absent witnesses (Pinkie Daniels) that, at the time defendant shot at Simon Bell, Bell was assaulting defendant with a shotgun and was attempting to shoot him, and that defendant shot at Bell in self-defense, and that defendant got the pistol he used in shooting at Bell in the house of Pinkie Daniels, where the shooting occurred, and got it after Bell had been pursuing him with a gun and was coming back toward the house with the gun; that he expected to prove by the other witness (Robert Bankston) that Simon Bell had gone away from the house, and sat down on the side of the road, some distance from the house, and that he (Bankston) went to Bell and insisted that he stop pursuing defendant with his gun, and Simon stated that he intended to assault defendant, and thereupon Bell did, having his gun with him, go back to the house where defendant was, and after returning Bell shot defendant in the face before defendant shot at Bell with the pistol. The district attorney admitted that these absent witnesses would testify, if present, to what was

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stated in the affidavit, and the court overruled the motion for a continuance.

Williamson & Wells, for appellant.

Upon the proof in this case an indictment against Simon Bell for assault and battery with intent to kill and murder Joe Montgomery could be sustained, whereas nothing but an assault with intent, in any view of the evidence, is even pretended to be proven against Montgomery, who was shot by Bell; but Bell was not hit or hurt in any way.

On a close question like this it was extremely important that Montgomery should have had the presence of the absent witnesses and should have had the opportunity to compel their attendance.

The mere fact that the district attorney is willing to admit that the witnesses, if present, would swear to the statements set out in the application does not justify the court in refusing a continuance or postponement of the case, where there has been no opportunity for compulsory process.

Now the court held that defendant was entitled to continuance, and a continuance would have been granted but for the fact that the state made the admission provided for under the statute. Under this state of the case the agreement to admit as required by statute does not justify the court in refusing continuance, the opportunity for compulsory process not being given the defendant. *Strauss* v. *State,* 58 Miss., 53; *Long* v. *State,* 52 Miss., 31; *Parker* v. *State,* 55 Miss., 414; *Foochee* v. *State,* 82 Miss., 513; *Hemingway* v. *State,* 68 Miss., 371.

The court below erred in the granting of the sixth instruction for the state. In the first place, the time and manner of giving this instruction was very unfair to the defendant and most certainly prejudiced his case with the jury. The opening argument for the state was closed, and while attorney for defense was arguing the case the court granted the instruction for the

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state without the knowledge of the defendant's attorneys. The case was urged for defense upon the idea that Simon Bell was the aggressor and did actually shoot Montgomery, and that the indictment charged assault and battery, and that Montgomery did shoot, maim, etc., with intent to kill Bell, when the proof showed that Montgomery did not shoot, maim, and wound Bell, but was shot by Bell, and most likely the grand jury had indicted the wrong man, since they made that charge. After close of argument for defense the district attorney nearly finished his closing speech and then picked up this sixth instruction and said to the jury: "Now, gentlemen of the jury, the court has given you this instruction for the state to answer the argument of defendant's counsel." This was the first knowledge defendant's counsel had of the granting such instruction, and at once objected to the granting of the instruction by the court and to the statement of the district attorney as to the court's purpose in giving it. The court answered the objection both to the instruction and the remark of the district attorney with absolute silence, and permitted the district attorney to read the instruction.

The district attorney then turned and said: "The gentleman may answer that now if he can." Counsel for defense simply remarked to the jury that the court did not grant instructions to answer arguments of attorneys. The court said nothing. Does not this court see what effect conduct like that on the part of the trial court and district attorney would have upon a jury? The court should have told the jury that the instruction was not given for the purpose assumed by the district attorney.

Secondly, we do not think the sixth instruction announced the law. The indictment charges assault and battery; that the defendant not only assaulted, etc., with intent to kill and murder Bell, but did shoot, strike, and wound Bell with intent, etc.

Now the court by the instruction told the jury that the charge of shooting, wounding, and maiming made no difference whatever, but even if the evidence showed defendant did not

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shoot, maim, etc., but shot at Bell with intent to kill, etc., when defendant was in no real or apparent danger of losing life, etc., at the hands of Bell, that defendant is guilty. The instruction does not say guilty of what. They found him guilty as charged in the indictment.

J. N. Flowers, assistant attorney-general, for appellee.

Counsel for appellant complain of the action of the court in refusing to grant a continuance and in giving instruction No. 6 for the state.

As to denying application for continuance, it will be noted that accused was indicted at the January, 1903, term, and that two other terms of court had passed when this application for continuance was made. It does not appear why Robert Bankston was not present. No postponement of the trial to a later day of the term was asked, although the application for continuance was made on Monday, the 12th day of September, the seventh day of the term, and the law provides for a term of forty-two days for this court.

Besides, defendant introduced an eyewitness in the person of Sis Dossett. The testimony of these absent witnesses would have been cumulative. If they had appeared and sworn that Montgomery shot in self-defense, they would have contradicted the accused himself. He says he fired after Bell had shot him, as Bell was running away. He does not say he shot in self-defense. He admits, really, that he was in no danger when he made his shots at Bell. He was not entitled to a continuance because of the absence of witnesses by whom he expected to prove that the thing did not happen the way he, the accused, says it happened.

And again, as far as this record shows, the witness Bankston could have been had during the trial—that is, the showing as to how the accused was hurt by the action of the court upon his application for a continuance should have been made at the hearing of the motion for a new trial. If this is not done, this

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court has no way of knowing whether appellant has been wronged; unless this is done, this court has no way of knowing whether the witness appeared during the trial or was available. This is the correct theory, and this showing should always be required on the motion for a new trial. Unless this is done, the court has no better view point at the end of the trial than it had at the beginning, except in so far as information may incidentally have cropped out in the course of the trial. This court held this should be done in *Strauss* v. *State,* 58 Miss., 53.

As to the giving of instruction No. 6 after argument had begun, see *Wood* v. *State,* 64 Miss., 776.

Whether the instruction charged assault with intent or assault and battery with intent, the accused could have properly been convicted under it for assault with intent to kill, and this is what was done. The instruction advised the jury that they could do this.

CALHOON, J., delivered the opinion of the court.

The motion for continuance should have been granted, or the court should have postponed the cause to another day of the term if it saw proper. The docket is called for trial or continuance, and it is not incumbent on him who makes the application to ask postponement to a future day of the same term. The court may do so on the application for continuance if the condition of the public business or the situation in that particular case makes it advisable.

The testimony of the absent witnesses was of great importance to the accused. The error is not cured because accused himself admitted that, after Bell had shot him in the face and head, he fired his pistol at Bell while Bell was running. He may, perhaps, be entitled in this case to the benefit before the jury of the principle that, under some circumstances, one may anticipate his antagonist if it appear that his flight was for vantage. To enable them to judge of this, the testimony of the absent witnesses was material, and defendant was entitled to

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their presence, because he had no opportunity for compulsory process to secure it. Code 1892, § 1425.

The sixth instruction was erroneous on its face as matter of law, and it was bad practice to permit its use as it was used. The indictment has two counts in one: First, a perfect charge of an assault with intent to kill and murder; and, second, a perfect charge of assault and battery with that intent. There was no evidence whatever of any battery. On the contrary, it is clear that defendant never hit his man, but it was he who was actually shot. The instruction told the jury that, "even though the indictment charges that defendant did strike and wound and maim Simon Bell, yet, if the evidence fails to disclose that Simon was shot or wounded, this makes no difference whatever; if the jury believe from the evidence beyond reasonable doubt that defendant shot at him, Simon, with intent to kill Simon when he was not in real or apparent danger of losing his life, or of great bodily harm at the hands of Simon, then the defendant is guilty, and this is true even though he failed to hit him with either of his shots." The verdict was, "Guilty as charged in the indictment;" thus, in obedience to the charge, convicting of the battery as well as of the assault. In 1 Whart. Cr. Law (10th ed.), sec. 640, it is said: "But there can be no conviction of a battery unless a battery be averred or implied." Every battery implies an assault, of course, because there can be no battery without an assault; but there may be an assault without any battery. The jury may convict of an assault under an indictment for assault and battery, but may not convict of assault and battery with no evidence of battery. An assault is simply an attempt to hurt, with the power to hurt, while the battery is where the hurt is done pursuant to the assault, and a defendant should not be convicted of what he has clearly not done. Our own statute (Code 1892, § 967) draws the distinction. It provides: "Every person who shall be convicted of . . . any assault or assault and battery," etc., shall be punished, providing the same punishment. The

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record history of this instruction shows that it was had of the court by counsel for the state during the argument for the defendant, whose counsel were in entire ignorance of it, and that it was for the first time produced by the counsel for the state in his closing argument to the jury, telling them that he had gotten the instruction from the court to answer the argument of counsel for the defense, who immediately objected and excepted to this practice, the court remaining silent. It is true that the state's attorney then said: "Counsel may answer the instruction now." This proceeding was not good practice, and not cured by the remark of the state's attorney, action on which might have required the reshaping of the whole argument. The court may grant instructions at any time before the jury retires, but not secretly. Other counsel interested should know of it, even though they have to be stopped in argument. This is the proper practice; though, in a case where the charge was clearly right, and not so adroitly prepared as to possibly mislead the jury, we would not reverse for a deviation from it. But we would reverse for this alone in the case before us. We write in full view of *Wood* v. *State,* 64 Miss., 775 (2 South. Rep., 247), and do not modify or overrule that case. We are not sufficiently informed of the exact situation in that case to do either. We feel sure, however, that the correct practice, under our system, is for the court to pass on all instructions asked on both sides before the argument to the jury begins. This rule should not be deviated from except on rare and emergent occasions in the discretion of the court, and even then with opportunity to the other side to prepare and request any counter charge applicable to its view of the facts; otherwise great injustice might occur to the defendant in favor of the party with the closing argument. Underholds and blows beneath the belt should never characterize trials, especially trials involving life or liberty. A court should so deport itself as that no juror or bystander can surmise its view of the facts. It is an unbiased jury alone which should pass on the facts; and this, on the theory of the

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law in Mississippi, is designed for the protection of innocence, which is presumed of all men until disproved in the legal mode on a fair and impartial administration of equal and exact justice.

Reversed and remanded.

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ICHABOD W. HARPER v. STATE OF MISSISSIPPI.

INTOXICANTS. *Unlawful sale. Evidence. Tricks.*

The sale of a ticket, representing intoxicating liquor, so arranged that as each bottle of liquor might be delivered a hole could be punched in the ticket to show the fact and the subsequent delivery of one or more bottles of liquor to the holder of the ticket, upon its presentation and punching, is a sale of liquor so delivered, although the money was paid by the purchaser when he received the ticket.

FROM the circuit court of, second district, Coahoma county.

HON. SAMUEL C. COOK, Judge.

Harper, the appellant, was indicted, tried, and convicted of the unlawful sale of intoxicating liquor, and appealed to the supreme court.

The evidence showed that appellant operated under the name of the Jonestown Beer Club, and sold tickets to any one who would pay the money for them, who thus became a member of the club as long as the tickets lasted; that one Stewart paid appellant one dollar, for which he received a ticket which entitled him to eight bottles of beer, upon which four bottles had been delivered, and, as the beer was delivered, appellant would punch the ticket, to show how much had been delivered.

The court gave the following instruction for the state, to which appellant excepted: "The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that the defendant was in charge of a club, and kept on hand beer,

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and furnished Stewart a ticket for one dollar, and then delivered the beer to Stewart, and punched his ticket for each bottle of beer delivered to Stewart, then he is guilty, and the jury should so find." The court refused the following instruction asked by defendant, to which he excepted: "The court instructs the jury that if they believe from the evidence that the beer in Harper's charge was on deposit for delivery to Stewart, and that Harper was only acting as the servant of a number of gentlemen in Jonestown who had purchased beer, and had it shipped to them, and was then divided out by giving tickets representing their *pro rata* shares, then they must acquit."

J. A. Glover, for appellant.

The defendant, Harper, was the steward of the Jonestown Beer Club, an association of gentlemen in the town of Jonestown, formed for the purpose of keeping for their own convenience liquid refreshments. From the evidence it will be seen that the members of the club would deposit with the defendant such money as they saw fit and have the defendant order so much beer to be kept on deposit until called for by them.

The question is, Was this a sale or barter of liquor? Here are a number of gentlemen belonging to a club, having a man to take care and attend to liquors for them, and as each member sees fit to order. This steward is in the position of an agent or bookkeeper in any store, obeying instructions of his employer. A man cannot sell or barter any article to himself, nor can an agent who has possession of his employer's property sell or barter that property to his employer. *Commonwealth* v. *Smith,* 102 Mass., 104; *Commonwealth* v. *Pomphret,* 50 Am. St. Rep., 340; *Commonwealth* v. *Ewing,* 145 Mass., 119; *Piedmont Club* v. *Commonwealth,* 87 Va., 540; *People* v. *Soule,* 74 Mich., 250; *Tennessee Club* v. *Dwyer,* 11 Lee, 452; *Siem* v. *State,* 55 Md., 566 (39 Am. St. Rep., 419).

The case of the *Nogales Club* v. *State,* 69 Miss., 218, does not decide the question that is presented in this case in any

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manner whatever, as in that case the defendants in error were indicted for selling liquor to a minor, although the minor was a member of the club. The law forbids selling liquor to a minor under any circumstances; therefore the said decision does not control, in any manner whatever, the case at bar.

William Williams, attorney-general, for appellee.

The testimony in this record is the strongest argument that can be made in support of the state's theory of this case. There is no error of law in the record, and if the facts in this case do not warrant the court in affirming the conviction, it is impossible to prevent one from evading the statute against unlawful selling of intoxicants.

TRULY, J., delivered the opinion of the court.

The ingenious defense so plausibly presented in the brief of counsel for appellant is not supported by the testimony. The proof shows that the witness Stewart bought from the appellant eight bottles of beer, paying therefor cash in advance, and receiving as evidence of his purchase a printed ticket or card, representing the amount of beer which the holder was entitled to receive upon presentation of the ticket. The ticket was so arranged that, as each bottle of beer was delivered, a punch hole was made to show that fact. This was a sale, within the meaning of the law. The fact that appellant operated under the style of the Jonestown Beer Club, and that any one could purchase a ticket entitling him to beer upon payment of the money, and remained a member only so long as his ticket lasted, far from being circumstances on which to predicate a theory of innocence, is proof strongly tending to show that appellant was openly and habitually engaged in the illegal sale of liquor.

Affirmed.

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EDWARD F. BRENNAN v. BENTRAM STRAAS.

JUSTICE OF THE PEACE. *Appeal. Record. Death of justice. Successor. Code* 1892, §§ 84, 2432.

Where a justice of the peace died after an appeal had been taken from his judgment, but before the record had been sent to the circuit court, and his administrator has complied with Code 1892, § 2432, providing that on the death of a justice of the peace his representative shall deliver his docket and papers to the clerk of the circuit court, who shall deliver them to the successor in office of the decedent, the appeal will not be dismissed although a term of the court has intervened between the death of the justice and the return of the record to the circuit court, and Code 1892, § 84, requires a justice of the peace in case of appeal to transmit the record to the circuit court on or before the next term thereof after the taking of the appeal.

FROM the circuit court of Jefferson county.

HON. MOYSE H. WILKINSON, Judge.

Brennan, appellant, was plaintiff, and Straas, appellee, defendant, in the court below. The suit was begun before a justice of the peace, who decided for defendant Straas, and Brennan appealed to the circuit court. The circuit court, upon Straas' motion, dismissed the appeal, and plaintiff Brennan appealed to the supreme court.

When the justice of the peace decided against Brennan, he filed his appeal bond within the five days' (Code 1892, § 82) time prescribed by law, and said bond was approved by the justice of the peace who tried the case. The justice of the peace died in a few days thereafter, before the next term of the circuit court of the county, and his docket, papers, etc., were delivered to the circuit clerk, as required by § 2432, Code 1892. A justice of the peace, successor to the dead magistrate who tried the case, was afterwards elected and qualified; but between the time of the death of his predecessor and his induction into office, a term of the circuit court had been held, and the record

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in this case was not filed in that court on or before the first day of the term. The successor of the justice of the peace who tried the case filed all the original papers in the case, with a copy of the record, to the next term of the circuit court after he qualified. Appellee Straas filed a motion in the circuit court to dismiss the appeal on the ground that the appeal was barred because the papers were not filed on or before the first day of the next term of the circuit court after the judgment was rendered. The court sustained this motion.

H. Cassedy, for appellant.

It is true that § 84, Code 1892, under ordinary circumstances, when taken alone, if not strictly complied with, would bar an appeal to a succeeding term of the court after the term to which the appeal was returnable. But this section must be construed, in a case of this character, with sec. 2432, and when so construed, the limitation is suspended until the election and qualification of a successor to the deceased justice of the peace.

There was no justice of the peace authorized by law to transmit these papers. It is true that the circuit clerk had in his custody the docket, statutes, and papers of the deceased justice, but he could only give mere certified copies of the originals to the appellant to file, which would not have availed him anything. Because the papers and dockets were in his hands as custodian, they were not in the court by reason of that fact; and if they were, the action of the court in dismissing the appeal was erroneous. A certified copy of the original papers would not satisfy sec. 84 of the code, because the law provides that the originals shall be filed. It is not the duty of the circuit clerk to file them, but the duty of the justice of the peace; and if there is no justice of the peace, what was appellant to do? He could not abstract the originals from the custodian, and certified copies would give the circuit court no jurisdiction.

Does the last clause of sec. 2432 give "any justice of the peace of the county" the right to transmit the original papers

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of a deceased justice? It authorizes him to determine any suit or execute any judgment of the deceased, all of which can be done without disturbing the custody of the papers; but in this case the suit was determined and the judgment superseded, so the justices of the peace of the county had nothing to do with reference to it; and, furthermore, the clerk is required by this section to preserve such books of statutes, papers, etc., and keep them in his custody as public records and deliver them to the successor of the deceased justice of the peace, and not to any justice of the peace of the county. So in order to file the necessary papers, "any justice of the peace of the county" applied to could not procure them to transmit without calling upon the clerk to violate his duty; and if the clerk violated his duty in this respect, the certificate of this unauthorized justice would have been void and of no effect; the clerk could not certify to them as an original proposition, and *certiorari* would not avail, because he would be guilty of no neglect of duty in keeping the papers and dockets for the successor of the deceased by failing to file them in the circuit court.

R. L. Corban, and *J. Edgar Torrey,* for appellee.

The condition of the appeal bond was that the appellant "shall appear at the next term of our circuit court to be held in the courthouse in Fayette on the second Monday in August, 1903, and there prosecute his said appeal." The regular August, 1903, term of the circuit court was held, and appellant failed to prosecute this appeal or to have the cause docketed and disposed of, but waited until the 4th day of February, 1904, and then attempted to get up this appeal.

The appellant had his remedy at the August term of the circuit court to bring his appeal before the court, although Faulk, the justice of the peace before whom the case was tried, died between the date of the judgment and the August term of the circuit court. Yet appellant had his remedy under § 2432, Code 1892.

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We understand the law to be that appeals to any court shall be made in the manner prescribed therefor by statute, and when they fail to comply with the statute they will be dismissed. The appellant could bring up an appeal from a justice of the peace to the circuit court in the same shape this one was docketed with as much propriety ten years after the judgment was rendered as he could one term after the time when the appeal was made returnable.

WHITFIELD, C. J., delivered the opinion of the court.

Section 84 must be held modified by § 2432, Code 1892, so as, in cases of this sort, to allow the appeal to be heard, though after the next term following the taking of the appeal, provided the appeal is sent up by the successor of the dead justice of the peace to the next term of the circuit court after such successor has qualified.

Reversed and remanded.

CHARLES J. BOLEN *v.* RICHARD G. LILLY ET AL.

HOMESTEAD. *Conveyance. Code* 1892, § 1983. *Non-joinder of wife. Warranty. Estoppel.*

The conveyance of a homestead, or any part of it, by the husband while living with his wife without her joining him in the deed, is not valid or binding, under Code 1892, § 1983, so providing, and a warranty clause does not create an estoppel against the maker of the deed, even after the death of his wife.

FROM the circuit court of Pontotoc county.

HON. EUGENE O. SYKES, Judge.

Bolen, the appellant, was plaintiff, and Lilly and others, appellees, were defendants in the court below. From a judgment in defendants' favor the plaintiff appealed to the supreme court. The action was ejectment. The facts are stated in the opinion of the court.

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R. V. Fletcher, for appellant.

The land in controversy was part of the homestead. Bolen is not precluded from recovering in this suit. This question is free from difficulty under the repeated decisions of this court. A deed to the homestead without joinder of the wife is void and operates nothing. *Hubbard* v. *Sage Land & Improvement Co.,* 81 Miss., 616.

A conveyance of the homestead without the joinder of the wife is void, and the property descends to the heirs and they may hold the same. *Johnson* v. *Hunt,* 79 Miss., 639.

The non-joinder of the wife renders the deed void, and an action at law may be maintained by the husband, the grantee being but a mere trespasser. *G. & S. I. R. R. Co.* v. *Singleterry,* 78 Miss., 772.

That the parties have removed from the premises makes no difference. The deed has conveyed no estate whatever. *McKenzie* v. *Shows,* 70 Miss., 388.

That Bolen's wife is dead does not affect appellant's right to recover in ejectment. The cause is determinable by conditions existing when the suit was brought. *Cummings* v. *Busby,* 62 Miss., 195.

See also as to whether the death of the wife affects the question. Thompson on Homesteads and Exemptions, sec. 489; *Martin* v. *Harrington,* 87 Am. St. Rep., 704, and notes. There is no estoppel. *McGhee* v. *Wilson,* 56 Am. St. Rep., 72.

Fontaine & Fontaine, for appellees.

The twenty acres of land sued for in this action were not a part of appellant's homestead exemption. The exemptionist has the right to select his homestead exemption, and this not only of land in which he is owner of the fee, but also of a leasehold estate. *Johnson* v. *Richardson,* 33 Miss., 462; *King* v. *Sturgess,* 56 Miss., 606; *Hinds* v. *Morgan,* 75 Miss., 509. And in land owned in common. *Lewis* v. *White,* 69 Miss., 352. And when no selection has been made, in case the dwelling house

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is on a quarter section of land, it does not require that such quarter be allotted as a homestead to the exclusion of an adjoining section. *Wiseman* v. *Parker,* 73 Miss., 378.

Appellant could sell any part of the territory about the place of his home at his will and by his own act, so that he does not trench upon the statutory amount exempted. *Nixon* v. *Hewes,* 80 Miss., 88.

This he did, and at the time of the sale to appellees of this twenty acres of land, and after deducting the amount sold to appellees, he still owned and possessed a larger quantity of land than one hundred and sixty acres, all contiguous, and has all the time continued to own and possess the same. By the act of conveying this land to appellees he selected for his homestead the other land and cannot assert the invalidity of his deed. *Rutherford* v. *Jamieson,* 65 Miss., 219. And he will not be permitted to make a new selection of homestead and embrace therein the land conveyed to appellees. *Richie* v. *Duke,* 70 Miss., 66.

Appellant is estopped by his said deed conveying the land to appellees, and he will not now be permitted after the expiration of nine years to claim that it was part of his homestead, from the facts that it adjoined the land upon which his dwelling house was situated, and that at the time he made the conveyance he did not own the fee in a part of the other land he was possessed of, and to re-select his homestead. The deed is valid and appellant is bound by it.

CALHOON, J., delivered the opinion of the court.

The court peremptorily instructed the jury to find a verdict for the defendants in the state of case we will now set out: Bolen, on December 23, 1893, being a householder and the head of a family, owned in fee simple one hundred and sixty acres of land, in a body, and of less value than $2,000, and had his home upon it with his family. Besides, he owned an undivided one-half interest in eighty acres adjoining and an undivided

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one-fifth interest in fifteen acres cornering on it, and a three-year lease of seventy-eight acres adjoining. So he then had, by lease, by undivided interests and in fee, three hundred and thirty-three acres of land, but was sole owner in fee of only one hundred and sixty acres, and on this he lived; and on that day (December 23, 1893) he conveyed by warranty deed twenty acres of this one hundred and sixty to Lilly and others, appellees, and this is the subject of this controversy. After this, and in 1895, Bolen removed from his old home, with his family, to the town of Pontotoc, where his wife, who had refused to join in the deed to Lilly and others, died in 1897. Since her death, Bolen, shortly before the expiration of the statutory bar by limitation, brought this action of ejectment for the twenty acres on the ground that the conveyance was void because of the non-joinder of his wife.

Lilly and others' sole defense to the action is the deed of Bolen, and his partial interest in the adjacent lands, except that they seek to place this case in the category of *Wilson* v. *Gray,* 59 Miss., 525, in which the court held (Cooper, J., dissenting) that a sale of the homestead by the owner, without the joinder of the wife, was valid if made "in order to effect" a change of his residence, pursuant to his previous resolve to make the change. It is needless now to inquire whether that decision, on the facts sought to be proved before the court then, should be applied to the testimony offered and admitted here. There evidence offered and refused to be admitted, and for which refusal there was a reversal, was to the effect that the vendor had used the money of the vendee to purchase a home in Texas, had determined to move there, made the sale for that very purpose, and soon after did move to the Texas home. Here there was simply an offer to prove by Lilly that Bolen told him he was going to move to Pontotoc. In fact, he did not go to Pontotoc until after a year and a half, or more, afterwards, and, in fact, Lilly could not have depended on this, because he made ineffectual efforts to have Mrs. Bolen join in the con-

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veyance. But it is useless, as we have said, to contrast the two cases; and this is because there is conflict in the evidence, which a jury only could decide upon, and there was a peremptory instruction. Even Lilly is doubtful as to when Bolen made the statement, and Bolen testifies that he never made it, and that he never thought of moving to Pontotoc until the fall of 1895. If the mere statement of the vendor of a purpose to remove is conclusive, the statute is worthless.

Whatever may be thought or said of the ethics of this action, it is certainly true, as a matter of law, that a conveyance of the homestead, or any part of it, by the owner, without his wife's joinder, is invalid, a void act—goes for nothing—and ejectment lies by the vendor to recover it. That the land was part of the homestead in the case before us, and that it was so regarded by Bolen, by his wife, and by Lilly and others, seems plain from this record. *Hubbard* v. *Improvement Co.,* 81 Miss., 618 (33 South. Rep., 413).

There is no estoppel because the conveyance had a clause of warranty. This would nullify the statute. The whole conveyance is invalid. *Connor* v. *McMurray,* 2 Allen (Mass.), 202; *Doyle* v. *Coburn,* 6 Allen (Mass.), 72.

The land being part of the homestead, as understood by all concerned, we need not consider the lands adjoining, in which Bolen had a part interest or a leasehold; but it would be hardly within the spirit and purpose of the statute to confine the homestead to these, when it was in fact located on the one hundred and sixty acres of sole ownership.

Reversed and remanded.

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ILLINOIS CENTRAL RAILROAD COMPANY v. JOHN H. SMITH.

RAILROADS. *Passengers. Blind person. Apparent incapacity. Actual capacity. Duty of ticket agent. Arbitrary refusal to carry. Damages.*

Where a blind person presents himself to a railroad ticket agent and offers to purchase a ticket entitling him to travel on the company's train:

(*a*) Its sale may be denied him if he be unable to care for himself or liable to require extra attention from the carrier or the passengers; but

(*b*) Where a person seemingly disabled is in fact, to the knowledge of the carrier, able to travel alone, without requiring extra care or attention, transportation must be furnished him; and

(*c*) It is the duty of the agent to listen to explanations made by and in behalf of the applicant touching his experience and capacity to travel alone, and to judge of his competency in the light of the facts then made known; and

(*d*) If the carrier, with knowledge or reasonable ground to believe that the applicant is in fact able to travel alone, without requiring extra care or attention, arbitrarily, willfully, wantonly, wrongfully, and unreasonably deny him transportation, the carrier will be liable to him for compensatory damages and, in the discretion of the jury, to punitive damages; and

(*e*) The reasonableness or unreasonableness of an agent's refusal to sell him a ticket, after explanation of his ability to travel alone, is a question for the jury to determine.

FROM the circuit court of Attala county.

HON. WILLIAM F. STEVENS, Judge.

Smith, the appellee, was plaintiff, and the railroad company, appellant, defendant in the court below. From a judgment in plaintiff's favor for $575 and costs, the defendant appealed to the supreme court. The facts are fully stated in the opinion of the court.

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Mayes & Longstreet, and *J. M. Dickinson,* for appellant.

Since the final decision in the case of *Zachary* v. *Railroad Co.,* 75 Miss., 752, the law of this state is that a blind person, familiar with travel and its conditions, and well qualified to take care of himself, being in possession of all his faculties and strength, save the one infirmity of blindness, cannot, on the sole ground of blindness, be denied transportation on a railroad train. The rule of the railroad company providing in this case that a person suffering from physical infirmities, or in any wise disabled, should be accompanied by an escort to give him attention and care, is a reasonable one, as this honorable court has practically declared in the two opinions in the Zachary cases, and it is only when the person with the infirmity brings himself within the exception, it is only when the person under disability proves that he is entitled to travel on the train unaccompanied, that he is entitled to transportation.

The court will observe that transportation was not refused to this plaintiff, and that, notwithstanding the refusal of the agent to sell him a ticket, quick and convenient transportation was still open to him at the time and on the day of this occurrence.

Ordinarily the refusal of a ticket agent to sell a prospective passenger a ticket might be treated as a practical refusal of transportation, and while this construction would be justified with one unfamiliar with conditions and unadvised as to the custom and usage of the company, yet in this instance Mr. Smith well knew that he could travel on the local passenger train without a ticket; that he would not be required to exhibit a ticket in order to obtain admission to the train or transportation on it; and he states that many times he had used that train without having purchased tickets for transportation. He, therefore, was not justified in standing on the technical refusal of the station agent to let him have a ticket. The burden of proof was on him to do all he could to reduce his damages and to save himself from inconvenience, and by merely embarking on

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the local passenger train he could have gone to Durant with a loss of only thirty minutes.

Mr. Smith was not entitled, on the facts of this case, to recover punitive damages. It is not contended that the rule of the company requiring people under an infirmity to have an escort is unreasonable; in fact, this honorable court in the Zachary cases has declared practically that the rule is not improper, and that in many instances its application would be rightful. But they make exceptions to the rule, and say that in each instance a case coming within the exception must stand on its own circumstances. In other words, the rule is reasonable and proper, and imposes *prima facie* a disability on the passenger who applies for the ticket, and shifts the burden to him to demonstrate that he is qualified to travel unattended, even though he may assure the station agent that he is. After all, the station agent would have nothing but his mere word to be guided by, and we insist that a mistake of judgment on the part of a station agent in obeying his duty to conform to the rules and regulations of the company, and especially to a regulation reasonable and justly imposable in many cases, such as was the rule obeyed by the station agent in this instance—that the action of an agent doing this lacks entirely that element of wanton or malicious wrong or reckless indifference to the rights of the passenger as would warrant the imposition of punitive damages.

That this verdict, except to an infinitesimal amount, is for punitive damages is shown by the fact that the plaintiff, as a witness, in stating his actual damages, says: "I estimate my actual loss of time and money by refusal of defendant company to sell me a ticket at Winona, as above stated, at $25 or $30."

Certainly there is no room for punitive damages in this case, where there was no insult, and only observance in good faith of a reasonable regulation, and when the person aggrieved knew that the declination of the agent did not prohibit him from enjoying the privilege of transportation.

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The court below refused instruction No. 7 requested by the defendant, which told the jury that they should allow only actual damages on the facts. The instructions granted plaintiff in this case were in many respects erroneous, and, taken as a whole, did not properly state the law.

Teat & Teat, for appellee.

"A common carrier of passengers cannot refuse to carry a person otherwise qualified upon the sole ground that he is blind; and a rule of the carrier forbidding the transportation of all unattended blind persons is unreasonable in its application to such a person who is competent to travel alone and take care of himself." *Zachary* v. *Railroad Co.,* 75 Miss., 746.

The court admitted, of course, that instances might arise in which a carrier might be warranted in refusing to sell a blind person a ticket, just as it might be warranted or not warranted in doing or not doing any other thing. The question of the reasonableness of the rule denying transportation to the unattended blind was settled. It was declared to be unsound, inapplicable, and unreasonable; and the question of whether or not a blind person was to be allowed to travel on the cars was by the court declared to be not a proper subject to be regulated by a rule at all, but the railroad company was put on notice that it was required to deal with all blind persons applying for transportation strictly in the individual capacity, and not in any instance regarding the issuance or refusal of transportation are they to be dealt with as a class nor proscribed against by any rule.

If this is the true interpretation of the opinion of the court, then there is no rule against the sale of tickets to blind people recognized by the court; and when a blind person applies to a ticket agent for a ticket, the natural and legal presumption is that he is entitled to it, just as other people are, because blindness, *ipso facto,* is no disqualification, and the law imposes a general duty upon all common carriers of passengers to carry

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all intending passengers; and if the railroad company does not sell an intending passenger a ticket for any reason, or if it refuses to sell such intending passenger a ticket for any reason whatever, it certainly assumes the burden of showing that he is not entitled to it.

In the case at bar there is much proof that the plaintiff was clearly qualified to travel on the appellant's cars. Many disinterested witnesses and officers of the county testified that he could travel and take care of himself almost as well as any person possessed of sight. Other proof shows that he had been a student for many years at the state institution for the blind at Jackson, Mississippi, and had attained a high degree of skill in the art of locomotion. This evidence in the record, coupled with the verdict below settling the fact that he was qualified to take care of himself, clearly settles his right of recovery.

Smith was entitled on the facts of this case to recover punitive damages for two reasons. Because the conduct of the agent toward the plaintiff was personally offensive, discourteous, and insulting in this: That after repeated efforts on part of the plaintiff to obtain a ticket and to show him his order book and to make full and reasonable explanation to the agent that he was entitled to a ticket and transportation, the agent declined to hear him, and after various curt and disrespectful remarks ordered the plaintiff in rough and angry tones to stand out of the way, that there were other parties who desired to purchase tickets, thus discriminating against him in favor of other passengers who had no more right than he, and after this the agent treated him so contemptuously as not to answer his inquiries. The plaintiff was unable so much as to gain his attention, although he was there in a public office where it was the agents duty to treat all persons courteously and politely, to hear their explanations and answer their honest inquiries.

The arbitrary enforcement of the pretended rule against this plaintiff denying him the right of transportation when he was

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clearly entitled to it, which fact was known to the agent and the appellant company (and since the decisions in the Zachary cases, too), was willful, high-handed, and in utter disregard of his rights, and is ground of itself warranting the infliction of punitive damages.

TRULY, J., delivered the opinion of the court.

Appellee, a minor, eighteen years of age, desiring to travel from Winona to Durant, in this state, applied to the agent of appellant to purchase a ticket, tendering proper fare. This was refused him on the ground that he was blind and unaccompanied by an assistant, and, under an existing rule of the railroad company, was not entitled to transportation. Appellee claimed that he was an experienced traveler, able to care for himself and needing no assistance. He offered to produce his order book to show that he was in the habit of traveling and booking orders for goods, but the agent persisted in his refusal. Thereby appellee was forced to change his route and travel over another railway. He brought suit against appellant, claiming both actual and punitive damages. The actual damage proven was small. The jury awarded punitive damages under the instructions of the court, and the Illinois Central Railroad Company appealed.

Several instructions were granted appellee, embodying the same general idea. The first and fifth will sufficiently illustrate the main propositions presented for consideration. They are as follows:

"No. 1. The court instructs the jury that if they believe that the plaintiff, J. H. Smith, on the 19th day of January, 1903, applied to the defendant's ticket agent at Winona, Mississippi, at the proper time and place and in the proper manner, for the purchase of a railroad ticket from Winona, Mississippi, to Durant, Mississippi, then and there tendering the requisite amount of cash fare, as alleged in the plaintiff's declaration, and that said agent then and there refused to sell

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plaintiff a ticket as requested for no other reason than that the plaintiff was blind, and that the plaintiff, although blind, was in fact otherwise qualified to travel, the defendant is guilty of a wrong, and they should find for the plaintiff, and assess his damages at such sum as they may think proper from all the evidence, not exceeding the sum sued for—to wit, $1,500.

"No. 5. The court instructs the jury, for the plaintiff, that a common carrier of passengers cannot refuse to carry a person, otherwise qualified, upon the sole ground that he is blind; and if a common carrier willfully refuses so to do, it is liable for punitive damages."

The general rule in force in this state is that which is embodied in the text and accurately stated in 5 Am. & Eng. Ency. Law, p. 538, note 4: "While persons who are ill have a right to enter and travel upon the conveyances of a common carrier of passengers, nevertheless the carrier is not bound to accept as a passenger, without an attendant, one who, because of physical or mental disability, is unable to take care of himself; but should the carrier voluntarily accept as a passenger such a person without an attendant, his inability to care for himself, rendering special care and assistance necessary, being apparent or made known at the time of his application for carriage to the servants of the carrier, the latter will be held responsible if such care and assistance are not afforded." See also *Weightman* v. *Railroad,* 70 Miss., 563 (12 South. Rep., 586; 19 L. R. A., 671; 35 Am. St. Rep., 660); *Sevier* v. *Railroad,* 61 Miss., 8 (48 Am. St. Rep., 74); *Railroad* v. *Stathan,* 42 Miss., 607 (97 Am. Dec., 478). This rule recognizes the authority of the carrier to exclude and deny transportation to any person desiring passage who, on account of physical or mental disability, is unable to care for himself, or liable on account of that incapacity to become a burden upon his fellow-passengers or to require extra attention from the carrier. But inasmuch as experience has shown that many persons seemingly incapacitated by physical disability are in truth perfectly competent to

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travel alone, the courts, in the interest of the traveling public, have modified the rigor and limited the otherwise universal application of the rule by providing that any person desiring transportation shall be entitled to passage upon payment of fare, notwithstanding his seeming incapacity, if, as a matter of fact, he be competent to travel alone without requiring other care than that which the law requires the carrier to bestow upon all its passengers alike; and if this proof of capacity be in any manner brought to the knowledge of the agent of the carrier, the carrier is liable in damages for any exclusion from its trains. This is the evident meaning of the opinion of this court in the case of *Zachary* v. *Railroad,* 75 Miss., 751 (23 South. Rep., 435; 41 L. R. A., 385; 65 Am. St. Rep., 617), where, through Whitfield, Justice, it is said: "Each case must depend on its own facts, and the reasonableness of the refusal to sell a blind person a ticket must on principle depend not on a universal, arbitrary, and undiscriminating rule like this one, but on the capacity to travel, unaccompanied, of the particular blind person, as shown by the proof on that point in his case." Primarily the affliction of blindness unfits every person for safe travel by railway, if unaccompanied. No blind person without previous experience could possibly accommodate himself to the many exigencies incident to travel by railroad, or guard himself against peril in boarding and alighting from trains, changing from one train to another, or threading his way in safety across the railway tracks at crowded stations. Hence the rule which provides that every blind person is presumed to be, in the absence of proof of experience, unfit to travel alone, is not unreasonable. Nor do we consider such a regulation a hardship upon the persons afflicted with blindness or other disabling physical infirmity. It is rather a safeguard thrown around them for their own protection. Therefore, when a blind person applies to purchase a ticket, being himself unknown to the agent, and that ticket is refused, the carrier is not liable by this act alone to be mulcted in damages; but, as before

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indicated, if the agent of the carrier knows of his personal knowledge of the competency to travel of the particular person, or if the fact of such ability is made known to him in any manner, and he still persists wantonly and arbitrarily in his refusal to sell the person desiring passage a ticket, the carrier may be made to respond in damages for his oppressive act. And it is the duty of the agent of the carrier to listen to the explanation made by the person desiring to purchase a ticket, and judge of his competency in the light of the facts then made known to him, and the question of the reasonableness or unreasonableness of his refusal is one of fact to be submitted to the jury, should litigation arise; and if it should appear that such refusal was reasonable under the circumstances, as they then existed to the knowledge of the agent, the carrier would not be liable to damages; but, as in every other case, if it should develop that his action was caused by wantonness or a desire to arbitrarily injure, humiliate, or oppress the proposed passenger by such action, the carrier would be responsible, and would be liable both to compensatory and punitive damages. In the instant case it will be observed that the first instruction set out above told the jury that if they believed the agent refused to sell plaintiff a ticket on the sole ground that he was blind, and that if they further believed that the plaintiff, "although blind, was in fact otherwise qualified to travel," then, these two facts being established, the railroad was convicted of a wrong, and the jury was authorized to find for plaintiff, and to assess his damages "at such sum as they may think proper from all the evidence, not exceeding the sum sued for." An inspection of the record shows that there was no dispute as to the fact that the agent's refusal to sell appellee a ticket was "for no other reason than that the plaintiff was blind;" so the first instruction in effect directed the jury to inflict such damages as they thought proper, from the evidence, upon the railroad company, if they, the jury, believed that the plaintiff, although blind, "was otherwise qualified to travel."

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The fifth instruction was to the effect that if a common carrier willfully refused to carry a person otherwise qualified, on the sole ground that he is blind, it was "liable for punitive damages." Both instructions are erroneous for want of the same limitation—*i. e.,* that the agent of the railroad knew, or had reasonable grounds to believe, or from circumstances within his knowledge ought to have known, that the person demanding transportation, although blind, was otherwise qualified to travel. The infliction of punitive damages is authorized where an employe of a carrier knowingly and wantonly refuses to do some act which his duty requires that he shall perform, and is not properly predicable of a fact unless proof of its existence is brought to the knowledge of the acting party. In this case, under the general rule hereinbefore announced, when the appellee demanded the right to purchase a ticket and become a passenger, while unattended by an assistant, the agent was acting within the scope of a reasonable regulation, designed for the protection of all persons suffering from disabling physical infirmities, when he refused to sell the ticket, and the fact, if fact it was, that appellee was in truth qualified to travel alone, unless brought to the knowledge of the agent, placed no additional liability upon the appellant. No matter how thoroughly competent appellee may have been to travel unattended or how extensive his traveling experience, unless the agent either knew, or from circumstances of which he had notice ought to have known, of this competency and previous experience, the mere existence of these facts could not in any way impute wrongfulness to an act committed in ignorance of them. If the agent of a railroad company refuses wantonly and arbitrarily to sell a ticket to a blind man, knowing at the time that such person is a thoroughly competent traveler, then the carrier would be liable to punitive damages, and the mere fact of blindness, and the apparent existence of a disability which the agent knew was only apparent and not actual, would not excuse or justify the oppressive act. But the two instructions under

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review ignore this vital element, and authorize the jury to inflict punitive damages upon the appellant for the commission of an act by its employe when, so far as the instructions show, the employe may not have known of the existence of the very fact which rendered his action in refusing the ticket wrong, if wrong it was.

As the case must be remanded for a new trial, we refrain from any comment upon the testimony as to whether the evidence proved that the appellee was competent to travel alone or whether the facts made known to the agent of the appellant were such as should have led him to infer such competency on the part of appellee.

Reversed, and remanded for a new trial.

HORACE STREET v. BENJAMIN L. SMITH.

1. JUDGMENTS. *Statutes of limitations. Code* 1892, § 2743. *New suit by assignee.*

   A suit by the assignee of a judgment, within the period of limitation, is a full compliance with the statute and extends the lien of the judgment, under Code 1892, § 2743, providing that actions on judgments shall be brought within seven years after their rendition.

2. SAME. *Judgment roll. Notice. How lien extended.*

   Under Code 1892, § 2743, requiring actions on judgments to be brought within seven years after the rendition thereof:

   (*a*) The judgment roll, in case of a recovery in an action by an assignee of the judgment to renew the same, need not show the assignment or that the new judgment was based on the original assigned one; and

   (*b*) The lien of a judgment can be extended only by the bringing of a suit thereon within the statutory period.

3. SAME. *Lien. Apparent bar. Renewal and extension. Code* 1892, § 2462.

   Code 1892, § 2462, providing that, where the remedy to enforce any lien which is recorded appears by the record to have been barred

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by limitations, the lien shall cease, as to creditors and *bona fide* purchasers, unless within six months after such remedy is so barred the fact that such lien has been renewed or extended appears by entry on the record, or by a new instrument filed for record within such time, has no application to judgment liens.

FROM the chancery court of Clay county.

HON. WILEY H. CLIFTON, Special Chancellor.

Smith, the appellee, was complainant, and Street, the appellant, defendant in the court below. From a decree overruling defendant's demurrer to complainant's bill defendant, Street, appealed to the supreme court.

The bill alleges that on January 6, 1892, J. H. L. Jerdine obtained a judgment in the circuit court of Clay county against Mrs. Lucy A. Munger for $1,432, which was regularly enrolled in the office of the circuit clerk of said county on the 14th day of January, 1892; that in 1899 complainant, for a valuable consideration, purchased from Jerdine said judgment, and it was regularly assigned and transferred to him; that before the judgment was barred by the statute of limitations an action was instituted by complainant against Mrs. Munger on said judgment, and it was revived against her in the name of complainant, and the new judgment was regularly enrolled in the office of the clerk of the circuit court of Clay county; that Mrs. Munger came into ownership of certain land described in the bill for life; that she afterwards conveyed portions of this land to the other defendants, and on the 4th day of February, 1901, gave a deed of trust on a part of the land to appellant, Horace Street, to secure an indebtedness to him which was unsatisfied. The bill prays for a cancellation of these several conveyances as clouds upon the title and as obstructions to the enforcement of complainant's judgment lien, and for the sale of the land under the judgment lien. Horace Street filed a demurrer to the bill, assigning the following cause of demurrer: It is shown by said bill that at the time of the execution of the deed of trust, mentioned in the bill as having been

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executed to said Horace Street, the judgment mentioned in the bill against said Lucy A. Munger in favor of J. H. L. Jerdine, which is of record, appeared on the face of the record to have been barred by the statute of limitations more than six months prior to the execution of the said trust deed, and it does not appear by any entry upon the margin of the record of said judgment lien that said judgment had been extended or renewed, or a new lien noting the fact of the renewal had been filed for record, within six months after Jerdine's judgment appeared of record to be barred; that prior to the enrollment of Smith's judgment Mrs. Munger had executed the deed of trust to Horace Street, and the judgment therefore ceased to be a lien as against said Street. The demurrer was overruled.

J. J. McClellan, for appellant.

Under § 2462, Code 1892, the Jerdine judgment ceased to be a lien against subsequent purchasers or encumbrancers for a valuable consideration without notice in six months after it was shown on the record to be barred, as there was no memorandum on the record to show that it had been renewed or extended, neither had a new lien noting the fact of the renewal or extension of said judgment been duly filed for record within such time.

Why should not this section apply to judgment liens? Sec. 756, Code 1892, provides for the enrollment of judgments. Sec. 757 provides that a judgment so enrolled shall be a lien from the rendition of such judgment. The same section provides that judgments shall not be a lien unless so enrolled.

The section above referred to, sec. 2462, provides how renewal liens shall be recorded, in order to preserve and keep alive the lien from the time of the creation of the first lien. The sections above referred to afford an opportunity for parties holding judgments to have them enrolled and thereby create a lien in their favor on the property of the person against whom the judgments are held. They are also intended

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to operate as notice to all parties who deal with such persons of the judgment liens on the property of such persons. The legislature saw proper to deal with the matter of how liens should be created and limited, and there is no good reason why sec. 2462 should not apply to judgment liens, but there is every reason why it should apply. It is clear that it was the purpose of the legislature to deal with all liens required to be recorded affecting the title to property or liens against property. Judgment liens certainly fall within this purview. If such was the purpose of the legislature, it is manifest that the enrollment of a renewal judgment must show on the face of the enrolled record the connection of the first judgment and the renewal judgment.

Gilleylen & Leftwich, for appellee.

Appellant relies in his brief on § 2462, Code 1892, as amended by ch. 98, Laws 1896. But this section of the code cannot properly be construed, save in connection with secs. 660, 756, 757, and 2750 of the same code. In fact, the whole body of our law must be looked to, and is looked to, in the construction of any statute. This requirement is not a hardship. *Klaus* v. *Moore,* 777 Miss., 701.

Noting "the fact of a renewal or extension of a lien" on the margin of the record thereof, as provided by the statute, was never intended to apply to judgments in reason and common sense. That provision was clearly intended to apply to deeds of trust, mortgages, mechanics' liens, and such like, contracts renewable by contracts and acts of the parties without the intervention of a court. A deed of trust can be kept alive by waiving the statute of limitation on the back of the note it secures in writing; and so on with other contractual liens. It was such liens the legislature would have the renewal of noted on the margin of the record. Judgment liens being only renewable by suit, no marginal entry was needed or contemplated.

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TRULY, J., delivered the opinion of the court.

The demurrer of appellant was properly overruled. The judgment in favor of Jerdine against Mrs L. A. Munger was assigned in writing—so the bill avers—to appellee before the expiration of seven years from the rendition thereof. By suit in the name of the assignee of the judgment, brought within the time prescribed by § 2743, Code 1892, the lien of the judgment was extended under the operation of § 2743, Code 1892. This was a full compliance with all of the provisions of law governing the renewal and extension of the lien of judgment which were obligatory upon the appellee.

Sec. 2462, Code 1892, has no application to judgment liens. This is made manifest not only by the connection in which the section is used in the chapter devoted specially to "Lands and Conveyances," and dealing primarily with the registry laws of the state, but it also becomes evident from an examination of the language of the section when considered in connection with other code sections relating to the same subject-matter. Sec. 2462 recites that where the remedy to enforce any mortgage, deed of trust, or other lien on real or personal property which is recorded appears on the face of the record to be barred by the statute of limitation, the lien shall cease and have no effect as to creditors and *bona fide* purchasers, unless within six months after such remedy is so barred the fact that such lien has been renewed or extended appears by entry on the margin of the record thereof, or a new mortgage, deed of trust, or lien noting the fact of renewal or extension be duly filed for record within such time. It is apparent that the section was never intended to apply to liens of judgments after enrollment which exist only by virtue of express statutory provisions, because judgment liens are not recorded, within the meaning of this section, and because a judgment lien can neither be renewed nor extended by the creditor, debtor, or trustee, as required by ch. 98, p. 106, Laws 1896, amending sec. 2462. Again, no new lien can be executed and duly filed for record, as required by the

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terms of this section, by which to note the fact of the renewal or extension of the judgment lien. Sec. 2462 applies solely and exclusively to liens which are created by contracts between the parties, and which are evidenced by writing duly filed and recorded under the registry laws. As such liens arise out of the voluntary acts and agreements of the contracting parties, so they may be renewed or extended by similar acts or agreements, provided the fact of such extension or renewal be evidenced in the manner which the statute requires. The provision of law which permits all such contractual liens to be renewed or extended by agreement of the parties, by notation upon the margin of the record, serves a twofold purpose: First —It gives notice to all creditors and *bona fide* purchasers that such lien was still in existence, and continued to rest, notwithstanding the apparent bar by limitation, upon the specific property therein mentioned. Second—It affords to the parties themselves a simple, convenient, and inexpensive method of extending the payment of the indebtedness secured by such instrument without losing the lien granted as security therefor and without the trouble and expense of preparing and recording new instruments. But the lien of an enrolled judgment is controlled by an entirely different and distinct legal principle. A judgment lien is established only by a solemn and final adjudication of a competent court, and takes effect as against creditors and subsequent *bona fide* purchasers from the date, not of its entry on the minutes of the court, but of its rendition, but only after due enrollment upon the judgment roll provided by law for the information of all concerned. And as the judgment lien is created by the final decision of a court, so it can only be renewed or extended by a similar process. The lien of a judgment can be extended by the filing of another suit upon the judgment before the expiration of seven years from the date of the rendition thereof, and in no other manner. In the instant case this course was followed by the appellee, and the fact that he had obtained and held a judgment against Lucy

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A. Munger appeared on the judgment roll—the proper place for such entry—not only within six months of the expiration of seven years from the rendition of the Jerdine judgment, but, in point of fact, several days before the lien of the Jerdine judgment had expired. The enrollment of the judgment rendered in favor of appellee by force of the statute renewed and extended the lien of the Jerdine judgment in his favor as assignee. The fact that the judgment roll did not show the assignment of the Jerdine judgment to appellee, or that the judgment in favor of appellee was based on the Jerdine judgment, does not in any wise affect the lien granted by law to the judgment creditor. The statute does not so require. An inspection of the judgment roll would have shown appellant that there was a judgment against Mrs. L. A. Munger, one of the parties who executed the trust deed to him, and who had originally owned all the lands included in that trust deed, and it would have shown, further, that there were judgments then in force against the said Mrs. L. A. Munger; and this was sufficient to put him on inquiry to ascertain whether the liens which they carried were in renewal and extension of former judgments also appearing on said roll and whether such liens had been properly kept alive and extended by suits filed in due time on such former judgments. It is not the judgment roll alone that a prospective purchaser must examine, but, if it shows judgments alive and unsatisfied, he must go farther and see what the records of the court show to have been the foundation of the suits in which the judgments were rendered. Had appellant adopted this course, the bill avers and the demurrer admits, he could readily have ascertained that the Jerdine judgment had been assigned to appellee, and that the lien thereof had been by appellee in due time and in proper manner kept alive and extended, and still rested upon the property on which Mrs. Lucy A. Munger and others executed to him a trust deed. The whole matter is regulated by statute, and appellee, having com-

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plied with all the requirements of law, is entitled to its protection.

Affirmed and remanded, with leave to answer within sixty days from the filing of the mandate in the court below.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY v. JOHN L. HARRINGTON.

1. **RAILROADS.** *Cattle guards. Code* 1892, § 3561.

   It cannot be judicially declared that the maintenance of a cattle guard of a specified pattern is a compliance with Code 1892, § 3561, making it the duty of railroad companies to maintain proper cattle guards, where their tracks pass through enclosed land, upon proof that the guard is less dangerous to the traveling public than any other kind, but ineffectual to turn cattle.

2. **SAME.** *Constitutional law. U. S. Const., XIV. amendment.*

   Code 1892, § 3561, requiring railroads to maintain cattle guards where their tracks pass through enclosed land, is not violative of the fourteenth amendment to the constitution of the United States as depriving the companies of property without due process of law.

FROM the circuit court of, second district, Coahoma county.

HON. SAMUEL C. COOK, Judge.

Harrington, the appellee, was plaintiff, and the railroad company, the appellant, defendant in the court below. From a judgment in plaintiff's favor the defendant appealed to the supreme court.

The suit was to recover damages to crops by the trespassing of stock, which plaintiff charged passed into plaintiff's field over a defective stock gap maintained on defendant's right of way at the point where the railroad entered plaintiff's enclosed lands, and, in addition, for the statutory penalty of $250 under § 3561, Code 1892. The case was tried in the lower court on an

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agreed statement of the facts, before the judge, a jury having been waived, and resulted in a judgment for plaintiff for $850.

It was agreed as follows: "That at the points of entrance and exit to plaintiff's inclosed lands by the tracks of defendant's railroad the defendant had put in a Ross surface stock gap and cattle guard, which at the time of the injuries complained of were free from defects of construction and were in good condition and in proper repair; that said Ross stock gap or cattle guard is equal to any other surface cattle guard now in use by railroads, and is up to the highest standard of surface cattle guards used in the operation of railroads; that, over these surface stock gaps or cattle guards, stock, at different times, passed into plaintiff's inclosed land and upon his inclosed lands as described in his declaration, and committed injuries to his crops and lands as sued for; that the defendant and other leading railroads of the country are abandoning the old pit guards and replacing them with the Ross cattle guard, or some other surface guard of equal effectiveness, for the reason that experience in operating railroads has demonstrated that the surface cattle guard in use by defendant, while not as effective in turning stock, insures safety to the lifes and limbs of the traveling public." In connection with the agreed statement of facts, and as part of same, some affidavits were incorporated, given by experts, to the effect that the surface cattle guards are not as effective in turning stock as the pit guard; that the pit guard is being abandoned by leading railroads because it is dangerous to the trains as compared with the surface guards, and has the tendency to imperil the lives of passengers and employes by derailments. It was further agreed that, if the court should decide in favor of plaintiff, judgment was to be rendered for him for $850.

It was stipulated in the agreement that the questions presented for decision were two: (1) Whether or not the Ross surface cattle guard is not a necessary and proper cattle guard, within the true meaning of § 3561, Code 1892. (2) If not a

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compliance with that section, whether or not said section is violative of the fourteenth amendment to the constitution of the United States, in that said section deprives the defendant of its property without due process of law—defendant's contention being that under the facts a necessary and proper cattle guard, within the purview of said section, is one that insures the safety of lives and limbs of the traveling public, although the same might not be as effective in turning stock as the pit guard; that to use the pit guard, which is more effective, but more dangerous to the lives and limbs of the traveling public, is not intended by said section, and, if that be true, then the same is a violation of the fourteenth amendment to the constitution of the United States, in that it deprives the defendant of its property without due process of law. Defendant's motion for a new trial was overruled.

Mayes & Longstreet, and *C. N. Burch,* for appellant.

The question is sharply presented, whether where there is a conflicting interest like this, where one sort of cattle guard is better for the protection of the adjacent agriculturist from trespass by cattle, and where the other sort of cattle guard is better for the safety of the passengers and employes of the railroad, the railroad company has fulfilled its duty under the statute in preferring and employing the sort of cattle guard which is better for passengers and employes, but not so effective for the farmer.

The court will note that the agreed state of facts is that "the leading railroads of the country are abandoning the use of the old pit guard for the reason that experience in operating railroads has demonstrated that the surface cattle guard . . . insures safety to the lives and limbs of the traveling public."

The court will carefully note the exact language of the statute, which is as follows: "It is the duty of every railroad company to construct and maintain all necessary or proper stock

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gaps and cattle guards where its tracks pass through inclosed lands."

It is not vital, but it will be helpful to note that we are here presented with one of the instances in which the word "or," as employed in the statute, is to be read as if it were the word "and." The language of the statute is "necessary or proper stock gaps," meaning "necessary and proper stock gaps." This is obvious, because otherwise the use of the word "proper" is futile and meaningless; for no stock gap could be necessary, in the legal sense, without being at the same time proper.

What the statute means is that the stock gaps shall be necessary as to their location and proper as to their construction. Such has been the practical interpretation placed upon this statute in all of our previous stock gap decisions, in which the question has been treated as to whether a stock gap was or was not properly constructed. 2 Am. & Eng. Ency. Law, 333, title "And."

The error into which the court below fell in applying this statute consisted in treating the same as if the interest of the landowner was alone to be consulted. Such is not the law. *Fort* v. *Chicago, etc., Ry. Co.,* 24 L. R. A., 657, 663; *Railroad Co.* v. *Goset,* 70 Ark., 431; *Railroad Co.* v. *Vosburg* (Ark.), 30 Am. & Eng. R. R. Cas., 1.

The principle above contended for, and fully set forth in the decisions cited, has been fully recognized by this court.

In *Railroad Co.* v. *Spencer*, 72 Miss., 491, speaking of stock gap legislation, this court said: "The purpose of such legislation is not merely to protect the property rights of the owners of cattle injured or killed, but to secure the safety of traveling on railroad cars."

In *Railroad Co.* v. *French,* 75 Miss., 939, the court said on p. 943 as follows: "But we have held that the statute requiring stock gaps and cattle guards to be erected and maintained when necessary and proper was designed not alone for the bene-

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fit of the landowner, but for the increased safety of the traveling public."

In *Railroad Co.* v. *Anderson,* 76 Miss., 582, the court said, in denying the right of the landowner to have an open lane at the place where he desired a crossing over the railroad track, with stock gaps and cattle guards at the expense of the company: "This would be burdensome to the company, and would, moreover, increase the danger to passengers, employes, and trains by leaving an open space on which live stock might congregate."

This court has fully recognized, therefore, the point for which we contend, which is, that these cattle guard and crossing matters are such that the traveling public are interested in them no less than the landowner.

The railroad company is, therefore, confronted with a predicament unavoidable by it, arising from the necessity of things. Here is one sort of cattle guard which is better for the landowner; here is another sort which is better for the traveling public and the train employes—better because it is safer. Can it be said that the company has disregarded the law which requires that the cattle guard shall be "proper" in its construction because it has seen proper to prefer the sort of cattle guard which is greater security to human life to that which gives greater security to crops? This would seem to be a question which should answer itself; but whether so or no, it is already answered judicially in the authorities cited above.

If the code section is so framed, and if it has the effect claimed for it here, that the company is mulcted in damages and subjected to penalties because between two standard styles of stock gaps it prefers the one which conduces to the safety of passengers and employes rather than the one which gives more special protection to the adjacent crops, then that sort of a statute is not "within the legitimate sphere of legislative power."

In the case of *Railroad Co.* v. *Humes,* 115 U. S., 512, the reservation for which we contend is carefully made; and Mr.

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Justice Field, after stating the case in his opinion, said: "If the laws enacted by a state be within the legitimate sphere of legislative power and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty, or property without due process of law."

But in the instant case that is just the pinch. We claim that such a law is not "within the legitimate sphere of legislative power."

In *Birmingham Mineral Co.* v. *Parsons,* 27 L. R. A., 263, it was held that a statute which imposes an absolute liability on the railroad company as to all stock passing over or through cattle guards fell short of due process of law, and was unconstitutional.

Here is a clash of interests between mere property rights, on the one hand, and the right of life and of personal security to the traveling public, on the other, and the latter considerations are and must be paramount. No legislature has any right, under any form of American constitutionality, so to disregard them or to prefer mere property interests to them.

Indeed, the whole doctrine of the police power of the state proceeds on a recognition of the underlying principle for which we contend here; for the most common ground on which it is exercised and justified, and justified in cases where property interests of individuals have not merely been subordinated, but have been actually nullified, is the paramount importance of caring for the health of the public, and *a fortiori* of their lives. The whole law of nuisance rests on this principle; so does the right of the establishment of quarantines; so does the right to regulate certain trades and callings, as the trade of a physician or that of a surgeon. Many similar instances will readily occur *to the mind of the court.* *Mugler* v. *Kansas,* 133 U. S., 623.

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J. W. Cutrer, for appellee.

Appellee does not agree with the statement of appellant that the word "proper" in the statute refers merely to the construction of the stock gap or cattle guard. The word as there used means, to quote Webster's definition of the word, "suitable in all respects." In other words, the stock gap or cattle guard must be effective.

This controversy when boiled down to its elements is a fight on the part of the railroad company to have the Ross surface cattle guard, by the ruling of this court, established as a legal guard, so that, when sued hereafter by the farmer on account of cattle entering the latter's field over and by way of the cattle guard, it will be sufficient answer to the declaration of the plaintiff to show by the railroad men that the guard in controversy was a "Ross," and that it was put down properly and was in good condition, and that it had by judicial decision been declared to be the thing which the law required. Such a decision would nullify the existing law.

The necessity for cattle gaps was not brought about by the farmer, but by the railroad; and the railroad, and not the farmer, should be compelled to solve the difficulties incident to their use. If it be true that there is no escape from the present difficulty aside from the fencing of the railroad's right of way, then the railroad, and not the farmer, should do it. And if it be argued that this course would entail an enormous expense upon the railroad, the sufficient answer is that the railroad, and not the farmer, brought about the necessity. Code 1892, § 3561, is constitutional.

Such legislation is undeniably an exercise of the police power, and when once it has been established that certain legislative regulations are legitimate exercises of the police power of the state, the court will not interfere with the enforcement of such laws on the ground that they are harsh and unjust. Those questions lie in the discretion of the legislature, just so long as the regulations bear equally on all persons or

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corporations upon whom they are imposed. *Mugler* v. *Kansas*, 123 U. S. (31 L. ed.), 235; *Barbier* v. *Connelly*, 113 U. S. (28 L. ed.), 923, and note; note to *State* v. *Goodwill*, 28 Am. St. Rep., 863, 882.

To use the language of Mr. Justice Field, in *Railroad* v. *Humes*, 115 U. S., 512, 520: "It is hardly necessary to say that the hardship, impolicy, and injustice of state laws is not necessarily an objection to their constitutional validity, and that the remedy for evils of that character is to be sought from state legislatures." And, as observed by Mr. Justice Miller, in *Davidson* v. *New Orleans*, 96 U. S., 97, 104, the fourteenth amendment cannot be availed of "as a means of bringing to the test of a decision of this court the abstract opinion of every unsuccessful litigant in the state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded."

WHITFIELD, C. J., delivered the opinion of the court.

The primary object of § 3561, Code 1892, is to protect the farmers of this state from the depredations of cattle entering over the railroad right of way, and this primary object must be the polestar of construction in determining its purpose. We have held, and again reaffirm the doctrine, that the object of the section was not only to protect farmers' crops, but to secure the safety of the traveling public. Because, in this particular instance, the Ross cattle guard is perfect of its kind, this court is not to decree its use a perfect defense to suits for damages by trespassing stock. The kind may not be reasonably effective to keep out stock—not a perfect kind of cattle guard. The argument is that, though this surface cattle guard is ineffective to keep out stock, yet, because it is less dangerous to the traveling public than the pit cattle guard, this Ross cattle guard, if perfectly constructed, must be judicially declared a compliance with § 3561, Code 1892, whose fundamental purpose is the safety of crops. This is an easily demonstrable

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fallacy. Pursue the contention to its logical result, and what do we have as the conclusion? Why, that since the Ross and other surface cattle guards, though ineffective to shut out cattle, better conserve the safety of the traveling public than the pit guard, therefore no cattle guard at all is best, since none at all least interferes with the safety of the traveling public. Or, to put it in syllogistic form: Major premise: The safety of the traveling public is the supreme concern. Minor premise: The Ross surface cattle guard, if ineffective against cattle, best secures the safety of the traveling public. Conclusion: Therefore, a Ross cattle guard complies with sec. 3561. Or, *ergo*, a cattle guard which secures the safety of the traveling public in the highest degree is the proper one under sec. 3561, even though the least effective against cattle, or not effective at all. From which it is an easy step to the conclusion that a plain track, uninterfered with at all, is the best cattle guard of all. This no one can fail to see would be a direct nullification of the primary object of the section, and is, of course, wholly inadmissible. On the contrary, it would be equally absurd to hold that a cattle guard which was perfect against cattle is a proper one, although it constantly resulted in loss of life by derailment of trains. Not here, more than anywhere else, is the solution of vexed questions to be found by running out opposite theories to extreme conclusions. We must administer the law as a practical science coming home to the "business and bosoms of men," not as a set of speculative theories intended for the exercise of a discursive fancy. The proper cattle guard must consult the safety of the traveling public, certainly; and just as certainly must it keep out stock. The proper cattle guard requires that it be so constructed as best to combine these objects; so as, whilst being reasonably effective against stock, it shall also be reasonably preservative of the safety of the traveling public.

As to the second branch of the argument, it is enough to say that sec. 3561 is a legitimate exercise of the police power of the state, and hence the fourteenth amendment to the constitution

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of the United States is not involved. This is settled by many decisions of the United States supreme court admirably grouped by appellee's counsel, among which we specially refer to *Mugler* v. *Kansas,* 123 U. S., 623 (8 Sup. Ct., 273; 31 L. ed., 205); *N. Y. & N. E. R. R. Co.* v. *Bristol,* 151 U. S., 571 (14 Sup. Ct., 437; 38 L. ed., 269); *Davidson* v. *N. O.,* 96 U. S., 104 (24 L. ed., 616); *R. R. Co.* v. *Humes,* 115 U. S., 520 (6 Sup. Ct., 110; 29 L. ed., 463); *Lake Shore & M. S. R. Co.* 1. Ohio, 173 U. S., 285 (19 Sup. Ct., 465; 43 L. ed., 702).

The public convenience, as well as the public safety, health, and morals, is within the sweep of the police power. That power is to organized government what the atmosphere is to man—"its vital breath, its native air." It penetrates, permeates, pervades all, in its omnifically healing reach—"broad and general as the casing air." It is the oil in which the machinery of government efficiently moves.

Affirmed.

MARY E. LANCE, ADMINISTRATRIX, *v.* GEORGE M. CALHOUN ET AL.

1. **ESTATES OF DECEDENTS.** *Surviving partners.* *Probation of claims.* *Code* 1892, § 1931.

   Code 1892, § 1931, forbidding executors and administrators paying unprobated claims, has no application to a surviving partner administering partnership assets.

2. **SAME.** *Code* 1892, § 1910 *et seq.*

   The fact that a surviving partner is indebted to the estate of his deceased partner does not preclude him from administering the partnership estate as authorized by Code 1892, § 1910, ***et seq.***

FROM the chancery court of Pearl River county.

HON. STONE DEAVOURS, Chancellor.

Final accounting by George M. Calhoun, one of the appellees, as surviving partner of the partnership estate of himself and S.

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E. Lance, deceased, and final accounting of J. J. Scarborough, the other appellee, as temporary administrator of deceased. From a decree allowing the accounts, Mary E. Lance, administratrix, appealed to the supreme court.

S. E. Lance died intestate on January 19, 1901, leaving a considerable estate, and was in partnership in the mercantile business with appellee, George M. Calhoun. Calhoun, on the 24th of January, renounced his right to administer on the partnership estate, and Mrs. Mary E. Lance, widow of S. E. Lance, was, on the 26th of January, granted letters of administration on the estate of her deceased husband. Calhoun afterwards repented of his renunciation and, on the 28th of February, undertook to withdraw the same, and applied, in vacation, for letters of administration, and was appointed by the clerk of the chancery court, and took charge of the partnership estate and proceeded to administer it. This order of the clerk was subsequently annulled and set aside by the chancery court, and the partnership estate ordered turned over to Mary E. Lance, administratrix of said estate. Pending the litigation between Mary E. Lance and Calhoun as to their rights to administer the partnership estate, Scarborough was appointed temporary administrator. During his administration of the partnership estate Calhoun paid debts due by the partnership without having them first probated and allowed. Calhoun made his final account as surviving partner for the time he administered, and Scarborough made his final account as temporary administrator. Mrs. Lance, administratrix, filed her objections to these final accounts, her principal objection to Calhoun's account being that he paid accounts which had not been probated and allowed, and their payment was therefore unauthorized by law. The court below allowed the accounts.

K. McInnis, and *S. E. Travis*, for appellant.

Not a single one of the accounts paid by Calhoun had been probated, registered, or allowed. Several of these were not

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itemized statements as required by law, and several of them were only receipts, in which cases there were no accounts at all.

There is no statute which exempts such claims from the rules of ordinary administration. Code 1892, § 1931, provides that the debts due by the late firm must be settled expeditiously. This is no more than the law requires in other cases. (Code 1892, § 1931, for example.) It does not carry with it the idea that they must be settled before ascertained and established in a legal manner. The few sections on surviving partners occur in the general chapter on the subject of executors and administrators. The whole must be construed together so as to give effect to each section, if possible.

In like manner temporary administrators are forbidden to pay any claims not probated, allowed, and registered. Laws 1900, ch. 94. We fail to see why a surviving partner should be an exception (as he is an administrator of the copartnership of which deceased was a member) to all the laws governing administrators, executors, and temporary administrators. Any other view on this subject not only disturbs, but destroys, the harmony of all sections of law on the subject of probation, allowance, and registration. We therefore submit that the chancellor erred in allowing the final account, and for this reason all claims paid by Calhoun, surviving partner, should have been disallowed.

The court will also find from the record that neither Calhoun, as surviving partner, nor Scarborough, as temporary administrator, published any notice whatever to creditors to probate and register their claims.

Sullivan & Tally, for appellees.

Neither the common law nor our statutes require creditors of a copartnershp (where one of its members dies) to have their claims probated, registered, and allowed, in order to have them paid out of firm assets; but if creditors, no matter whether they be firm creditors or individual creditors, were to undertake to

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collect their claims out of assets of the individual estate of the deceased member of the firm, they would be required by our statutes to have their claims probated, registered, and allowed, within the time required by law, or they would be barred. *Nagle* v. *Ball,* 71 Miss., 336. Our contention is also strongly supported by the case of *McCaughan* v. *Brown,* 76 Miss., 496.

TRULY, J., delivered the opinion of the court.

Section 1931, Code 1892, has no application to a surviving partner who is administering the estate of his deceased partner in the partnership assets. Except as specially changed by the statute, the surviving partner still possesses all the rights and powers which he held under the common law. *McCaughan* v. *Brown,* 76 Miss., 496 (25 South. Rep., 155).

A brief examination of the statutory provisions relating to the administration of estates generally, as distinguished from the administration of a partnership by a surviving partner, will disclose the reason for the difference in the procedures to be followed. Probation of claims within a short time is required, so that the private, separate estate of the decedent may be promptly administered and distribution of the assets made. Administrators are forbidden to pay any claim against the estate unless the same shall have been probated, allowed, and registered. This provision is necessary because the party who contracted the debt, and who probably alone knew all the particulars of his just indebtedness, being dead, prevents the possibility of the collection of fraudulent claims by requiring that every claim shall be proven in the prescribed mode by competent proof, and providing a simple method of contesting any claim of doubtful validity. But no such precaution is demanded in the case of a surviving partner, for the reason that he is himself jointly interested in the assets coming into his possession as survivor, and is jointly liable with the estate of his deceased partner for all debts due by the firm, and of his personal knowledge is advised whether a claim presented is simu-

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lated or is justly owing by the firm. The administration by a surviving partner of the partnership assets, and the payment of the partnership debts, is entirely distinct and separate from the administration of the private, personal estate of the decedent.

In the case at bar the chancellor found that all of the claims paid by the appellees were just and legal demands due by the partnership, and as such were properly payable out of the assets of the firm, even though not probated. We find nothing in the record to cause us to doubt the correctness of his conclusion. If, as contended by appellant, Calhoun, one of the appellees, is in truth indebted to the estate of his deceased partner in any sum whatever, the administratrix is not debarred from employing her legal remedy and enforcing collection thereof. But the fact, if fact it be, that such an indebtedness was due the estate of the deceased partner, did not affect or diminish the rights of the survivor to administer the partnership assets until the same were taken out of his hands, by order of court, under the plain provisions of the law.

Affirmed.

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EDGAR W. CARLISLE ET AL. *v.* VILLAGE OF SILVER CREEK.

1. OFFICIAL BONDS. *Evidence. Code* 1892, §§ 1793-1797. *Municipalities.*
Under Code 1892, §§ 1793-1797, regulating the subject, in a suit upon the official bond of a village marshal, a copy of which was filed with the declaration, the copy of the bond so filed and the minute book of the municipality containing a record of the same is admissible in evidence in the absence of a plea denying its execution.

2. SAME.
In such case it is competent to prove by the defendant that he held the official position in question and executed the bond sued upon as his official bond.

3. SAME. *Marshal. Assault in making arrest.*
Although a village marshal may make an arrest without a warrant for an offense committed in his presence, he is liable on his official bond for damages resulting from a brutal and wanton assault in so making an arrest.

FROM the circuit court of Lawrence county.

HON. JOHN R. ENOCHS, Judge.

The village of Silver Creek, the appellee, suing for the use of one Alonzo May, was the plaintiff in the court below; Carlisle and the sureties on his official bond, the appellants, were defendants there. From a judgment in favor of the plaintiff for $500 and costs, the defendants appealed to the supreme court.

The declaration had attached to it and filed with it a copy of the bond sued on, and on the trial plaintiff introduced this in evidence, and also introduced the minute book of the village containing a record of the official bond of defendant, Carlisle. This was objected to by defendants, the objection was overruled, and exception duly reserved. The evidence for plaintiff on the merits was to the effect that at the time laid in the declaration while plaintiff and another person

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were standing talking, Carlisle, the marshal, came up, and undertook to arrest plaintiff for being drunk and disorderly in a public place, and struck him over the head with a club, and knocked him down, and struck him and knocked him down with the club several times, and held him down and beat him until he became insensible, and continued to beat him until some one interfered and stopped him. Defendants' motion for a new trial was overruled.

A. E. Weathersby, and *R. D. Cooper,* for appellants.

The admission, over the defendants' objection, of the record of what purported to be Carlisle's official bond, is a fatal error. Unquestionably the record disclosed the fact that better evidence than itself existed, and plaintiff made no effort to introduce that better evidence or to account for its absence. Therefore the page of the book introduced as the minutes of the board of mayor and aldermen of the village of Silver Creek was secondary evidence. The failure to introduce the original bond was not cured by the testimony of defendant, Carlisle, which was given over the objection of his counsel, for the reason that he was incompetent to show by his testimony what the record contained. A record speaks for itself. *Ferguson* v. *Brown,* 75 Miss., 214.

From the evidence in the case it appears that the book introduced as the minutes of the board of mayor and aldermen of the village of Silver Creek is but a copy of the original minutes as made by the clerk of said board, and the page of said book introduced in evidence over defendants' objection was not transcribed thereon by the clerk of said board, and is but a copy of a copy, and was not admissible. *Cary* v. *Fulmer,* 74 Miss., 729.

G. Wood Magee, for appellee.

A copy of the bond sued on was filed with the declaration in the case. Appellee did not have to account for the original bond,

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as appellants seem to think, before he could be permitted to introduce evidence as to the copy filed or before he could introduce the recorded bond in evidence. Under §§ 1779, 1793, 1794, Code 1892, appellee could have saved himself the trouble of putting witnesses on the stand and introducing the recorded bond if he had produced in court a certified copy of this bond. Appellants did not file a sworn plea denying the execution of the bond, and hence appellee was not put to strict proof of the execution of the bond by defendants. But introducing a certified copy is not the only way of making proof of a document. A witness may be permitted to testify to the correctness of the copy, as witnesses Denson, Berry, and Carlisle did on the trial hereof. 4 Cyc. of Ev., 827, 828.

Nothing in the record shows that the jury were prompted by passion or prejudice, partiality or corruption, and the court will not disturb their finding. They evidently thought, as did the witnesses for appellee, that the marshal had no right to beat a man senseless, and strike him on the back of the head while down, for no cause other than because appellee was drunk on the streets of the village.

There is a difference between brute force and official authority, but this marshal of Silver Creek failed to recognize the difference. "Except in self-defense an officer has no right to proceed to the extremity of shedding blood in arresting, or preventing the escape of one whom he has arrested, for an offense less than felony, even though the offender cannot be taken otherwise." 3 Cyc., 892; *Brown* v. *Weaver,* 76 Miss., 7; *Thomas* v. *Kinkead,* 55 Ark., 502; *Wallace* v. *State,* 21 South. Rep., 662.

TRULY, J., delivered the opinion of the court.

The record and the copy of the official bond of Carlisle as marshal, in the absence of any plea denying the execution thereof or the signature thereto, were properly admitted in evidence. Code 1892, § § 1793–1797. It was perfectly

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competent to prove by appellant, Carlisle, when testifying as a witness in his own behalf, that he occupied the official position of marshal, and that as such officer he had executed the bond sued on.

On the merits: If the testimony for the appellee be true—and the jury accepted it as truth—he was the victim of a cruel, brutal, and wanton assault, clearly entitling him to the full amount of damages awarded. Officers are charged with the duty of enforcing the law and given the authority of arresting without warrant all those committing offenses in their presence, and in effecting such arrests may use such force as may be necessary to overcome resistance. But in this case, even if it be assumed that the arrest of May without warrant was at the time lawful, the officer far exceeded the authority vested in him, and became himself a violator of the law.

The judgment is affirmed.

FRANK CALDWELL *v.* STATE OF MISSISSIPPI.

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CRIMINAL LAW. *Continuance. Absent witness. Admission of what witness will testify.*

Where a witness, on account of whose absence a continuance in a criminal case was asked, was shown by the record to have been duly subpœnaed, and to live a short distance from the courthouse, and to be too sick to attend the trial, and these facts were not contested by the state, and the testimony of the witness was material, the trial should have been postponed until the attendance of the witness could have been procured, although the prosecuting attorney admitted that the witness, if present, would testify as stated in the application.

FROM the circuit court of Montgomery county.

HON. J. T. DUNN, Judge.

Appellant, Caldwell, was indicted for the unlawful sale of intoxicants. The case was twice continued. At the October,

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1904, term of the court the case was called for trial, when defendant made a motion for a third continuance, and in support of it made the following affidavit: "Comes defendant, Frank Caldwell, who says he cannot safely go to trial at this term of the court on account of the absence of Susan Caldwell, a material witness for defendant, who is not absent by his procurement, and who lives within the jurisdiction of the court, and he expects to have her present at the next term of court, and he expects to prove by her that at the time and place the state witnesses will testify that they bought whisky from defendant she was present, and that no such sale was made, and that defendant did not sell witneses any whisky, and that defendant cannot prove this by any other witness, and that said Susan is now sick and unable to attend court." The district attorney admitted that this witness, if present, would testify as stated in the application, and the motion for a continuance was overruled. The only testimony for the state was that of one Drane, who testified that he bought a pint of whisky from defendant on the 7th of April, 1903, at his place of business in Montgomery county, Miss., and paid him fifty cents for it. Defendant testified in his own behalf that he did not sell Drane any whisky on that date or on any other day, and one witness testified that Drane had stated in his presence that he (Drane) had never bought any whisky from defendant. Defendant was convicted, and sentenced to jail and to pay a fine of $500, and appealed to the supreme court.

Hill & Knox, for appellant.

The continuance should certainly have been granted. The witness was material, and, in the light of the state's evidence, very material, as it was testified that the sale was made at defendant's house, where his wife and absent witness was. Mrs. Caldwell was sick, and lived only about one mile from the courthouse. The action of the court in overruling the application

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Brief for appellee.

violates the decisions of *Watson* v. *State,* 81 Miss., 700, and *Scott* v. *State,* 80 Miss., 197.

William Williams, attorney-general, for appellee.

Appellant's case was continued at the October term, 1903. The reason for said continuance is not shown by the record. His case was again continued at the April term, 1904, presumably by consent. At the October term, 1904, appellant filed an application for a continuance, supported by his affidavit, in which he said his wife, Susan, was sick and could not attend court. This affidavit was not supported by that of any one else nor by a certificate of a physician, nor does it show that appellant's wife had been subpœnaed as a witness in his behalf. The district attorney agreed to admit the affidavit in evidence, and the court overruled the application for a continuance.

The appellant alleged in his affidavit that he expected to prove by his wife that at the time and place the state witnesses would testify that they bought whisky from him, his wife was present and no such sale was made. The appellant testified that the witness against him was not at his place on the day the sale is alleged to have been made, and says further that his wife was in and about the house "attending to things," as she generally did, and that the place where he kept groceries was ten or twelve steps from the house; so it can readily be seen that the state witness could have made the purchase without the wife of appellant knowing anything about it. And as the record does not show the wife of appellant to have been subpœnaed, and as appellant's affidavit was admitted to be read to the jury, we submit that the court properly denied the application for a continuance.

Unless it is shown that the discretion of the trial court has been abused, a judgment will not be reversed because the court refused a continuance. *Solomon* v. *State,* 71 Miss., 571.

The instant case does not fall within the rule announced in *Scott's* case, 80 Miss., 197, in that the wife of the defendant had

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been duly subpœnaed in that case. It is submitted that counsel for appellant's position is not sustained by the rule announced in *Watson's* case, 81 Miss., 700, for the reason that the facts of the two cases are entirely different.

TRULY, J., delivered the opinion of the court.

In view of the facts that the statements contained in appellant's affidavit for a continuance were not denied or in any wise discredited, the application should have been granted. The record shows that the witness desired had been duly subpœnaed, was in less than one mile of the courthouse, and was too sick to attend the trial. The state should have either contested the truth of these statements, or the trial should have been postponed until the attendance of the witness could have been procured. The record of a completed trial shows that the testimony of the absent witness would have been most material to the appellant, and we cannot say with confidence that the result might not have been different if that testimony had been detailed by the witness to the jury. Under the facts of this case the error in refusing a continuance was not cured by the district attorney admitting that the witness, if present, would testify to the contents of the application. Defendant was entitled to have his witness present in person. *Scott* v. *State,* 80 Miss., 199 (31 South. Rep., 710); *Watson* v. *State,* 81 Miss., 700 (33 South. Rep., 491).

Reversed and remanded.

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FRANK N. BOWLES v. LEFLORE COUNTY.

1. BOARD OF SUPERVISORS. *Stock law. Code* 1892, § 2056. *Petition. Entire county. Part of county.*

   An order of the board of supervisors, made upon a petition to have the stock law put in force in the entire county, is utterly void where it purports to put the law in force in only part of the county, under Code 1892, § 2056, regulating the subject.

2. SAME. *Void order. Appeal.*

   A void order of the board of supervisors, purporting to put the stock law in force in a part of the county, is not subject to a proceeding for its reconsideration, at a subsequent term of the board, so as to give the right of appeal from a refusal to vacate it.

FROM the circuit court of Leflore county.

HON. A. McC. KIMBROUGH, Judge.

Bowles, the appellant, petitioned the board of supervisors of Leflore county to reconsider and vacate an order previously made purporting to put the stock law in force in a part of the county. The board denied his petition, and he appealed to the circuit court. The circuit court dismissed the proceeding, and Bowles appealed to the supreme court.

At its April meeting, 1903, a petition was presented to the board of supervisors of Leflore county for a general stock law for the entire county. There was a counter petition against extending the stock law to certain parts of the county. At that meeting the board passed an order declaring the stock law in force, but excepted from its operation a portion of the county. At the October, 1903, meeting of the board, appellant and others presented a petition praying that the order passed at the April meeting be annulled and vacated, as being void, because the petition upon which it had been granted was for a general stock law for the entire county, and not the county with certain portions excepted. The board of supervisors decided that it

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had no power to alter the order entered at the April meeting, and dismissed the petition. A bill of exceptions was taken, and an appeal prosecuted to the circuit court. In the circuit court the county, by its attorneys, moved the court to dismiss the petition on the ground that the board of supervisors had no jurisdiction to consider the petition, and could not at the October meeting change an order made in April. This motion was sustained, and the cause was dismissed, and from that judgment this appeal is prosecuted.

McClurg, Gardner & Whittington, for appellant.

Whatever may have been the judgment of the board of supervisors upon the question, it certainly had jurisdiction of the subject, and when the circuit court dismissed the case on the ground that the board had no jurisdiction, and because the board had none the circuit court had none on appeal, that court erred. We submit, as an initial proposition, that there is no room to defend the error of the circuit court in holding that the board of supervisors had no jurisdiction to hear and determine the issue presented, and that for this patent error this cause must be reversed in order that the circuit court may decide whether an order entered granting a stock law in districts or portions of the county is responsive to a petition for a general stock law all over the county, and whether it is lawful for those living in a stock-law district of the county and enjoying its blessings or curses, as it may have proved to that district, to sign a petition to force the blessing or to inflict the curse upon those who do not desire either. Hence, we say, as to the bare question of jurisdiction, there was a clear misconception of the main issue by the circuit court in refusing to consider the points presented and concluded at the April meeting. The truth is, as the transcript discloses, there is here no sort of effort to reopen anything done in April. The legal effect of what was then done, shown upon the face of the papers, is all that the October meet-

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ing was asked to consider, all that the circuit court was asked to review on appeal.

Gwin & Mounger, for appellee.

There was no error in the action of the circuit court in sustaining the motion to dismiss the appeal from the board of supervisors. At the April term of the board of supervisors that board examined the petitons for and against the stock law, and, after examination thereof, rendered its judgment both of fact and of law thereon.

At the April term the opponents of the stock law had their day in court, and if dissatisfied with the judgment of the board at that meeting, they should have appealed as provided by law. Code 1892, § 79. Appeal to the circuit court or a writ of *certiorari* was their only remedy. Instead of pursuing their remedy as provided by law, they waited several months, presumably for the purpose of obtaining additional signers to their petition, and then, afterwards, at the September meeting, when the people of the county had let down their fences, fenced in their pastures, and made their preparations for the stock law, about a month before the order of the board was to become effective, they present their petition for the repeal or modification of the order entered at the April meeting. This petition was considered by the board, and the board, after consideration, entered an order refusing to grant the petition.

From this order refusing to grant the September petition the appeal was taken to the circuit court. No appeal was ever taken from the April order. We submit that the board did not have authority to repeal or modify the April order at its September meeting, following.

After it had adjourned its April meeting it had no power to review, vacate, or reverse the order entered at that meeting. The April order shows affirmatively all jurisdictional facts, and the order stood like any other judgment from which no appeal had been taken. This is expressly decided by the supreme

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court in the case of *Keenan* v. *Harkins*, 82 Miss., 709. In 7 Am. & Eng. Ency. Law (2d ed.), 1008, cited in *Keenan* v. *Harkins, supra,* it is stated that a board of supervisors cannot rescind such an order in the absence of fraud or imposition, and there is no suggestion of either fraud or imposition in this case. It will be borne in mind that the action of the board at its April meeting is not before the court on this appeal. No bill of exception was taken from that action, and there is no way in which the circuit court could review that action, however erroneous it may have been. *McGee* v. *Jones,* 63 Miss., 453.

CALHOON, J., delivered the opinion of the court.

The petitions to the April term, 1903, of the board, are all that the stock law be put in force in the whole county. On these, the order of the board, not appealed from, putting the law in force in the whole county, excepting a certain part of it, was void. It may be that there would have been too few petitioners, or none at all, for the law with any part excepted. Code 1892, § 2056. As to the stock law, therefore, the law remains as it was before the order, and will so continue until the board acts on the petitions, from which action an appeal will lie.

But this void order was not subject to the proceeding at the subsequent September term, 1903, by petition of a citizen to reconsider and vacate the void order of the April term, so as to give the right to an appeal from its refusal to the circuit court.

Affirmed.

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Sardis & Delta Railroad Company v. William J. McCoy.

Witnesses. *Rejection of false testimony. Instruction. Right of jurors.*

An instruction is erroneous which advises the jury that they may reject the entire testimony of a witness who has sworn falsely in any particular, without embodying the limitation that such false swearing must have been done wilfully, knowingly, and corruptly.

From the circuit court of, first district, Panola county.

Hon. J. B. Boothe, Judge.

McCoy, the appellee, was plaintiff, and the railroad company, appellant, defendant in the court below. The suit was for the value of a mule killed by a train on the track of the railroad company. From a judgment in plaintiff's favor, the defendant appealed to the supreme court. The instruction passed upon and condemned by the supreme court was as follows: "The court instructs the jury that they are the sole judges of the weight of evidence and the credibility of witnesses, and may give just such weight to the testimony of any witness as, in the light of all other facts and circumstances in the case, they may think it entitled to; and if they believe that any witness has testified falsely in any material point, they may reject the testimony of such witness altogether."

Shands & Shands, for appellant.

The second instruction given for plaintiff is objectionable and erroneous for two reasons: It charges the jury that "if they believe that any witness has testified falsely, they may reject the testimony of such witness altogether." This leaves out the important qualification of "knowingly" testifying falsely, which is the thing that gives the jury the right to reject such testimony. This must have had an influence upon the jury, for they

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evidently did reject the testimony of the two witnesses for the defendant, or they could not have found the verdict they did.

The instruction is also objectionable and erroneous, for there was nothing whatever in this record to make the testimony of the two witnesses for the defendant appear improbable or unreasonable, and they are uncontradicted; and it has been expressly decided by this court that in that state of case such an instruction should not have been given. *Railway Co.* v. *Tate,* 70 Miss., 348. The giving of this instruction for plaintiff would naturally tend to make the jury believe that the court considered the testimony of such witness questionable, to say the least. We consider the instruction, therefore, misleading and harmful error.

L. F. Rainwater, for appellee.

The facts present a case for the jury, and not for the court. As was said by the court in *Mobile, etc., R. Co.* v. *Holt,* 62 Miss., 173: "This case is peculiarly a question of common sense and common experience, and as such should be left to the jury. The jury having answered it for the plaintiff, this court should not interfere."

There was no error in the instructions of the court, and the judgment should be affirmed.

TRULY, J., delivered the opinion of the court.

This is a very close case on the facts, so close that the error of law in granting the second instruction for the plaintiff is fatal. We again announce that, where jurors are instructed as to their right to reject the testimony of witnesses on the ground that they have sworn falsely to any part of their testimony, the instruction should always contain the limitation that such false swearing was "willfully, knowingly, and corruptly" done. The instruction under review does not contain this necessary qualification.

Reversed and remanded.

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CLARA WILZINSKI v. CITY OF GREENVILLE.

MUNICIPALITIES. ***Special assessments. Front foot-rule. Constitutional law. Constitution*** **1890,** ***sec.*** **17.**

A municipality may, by legislative authority, charge the costs of paving a sidewalk as a lien on abutting lots of different owners according to the front-foot rule, and so to do is not a taking of private property for public use without compensation.

FROM the chancery court of Washington county.

HON. CAREY C. MOODY, Chancellor.

The city of Greenville, appellee, was complainant in the court below; Mrs. Wilzinski, the appellant, was defendant there. From a decree in complainant's favor the defendant appealed to the supreme court.

The city of Greenville, being authorized by its charter, under certain conditions, to improve its streets and sidewalks by special or local assessment, to assess the entire cost of improvement upon the lots abutting on the street or sidewalk improved, and to apportion the same among the lots in the proportion that the frontage of each lot bears to the street or sidewalk improved, caused sidewalks to be constructed and laid in concrete along Central avenue, and, in compliance with its charter, assessed the cost thereof upon the abutting lots. Appellant owns a lot abutting on this avenue, and was assessed to the amount of $96.20 as its proportion of the entire cost of the sidewalk so laid. Appellant refused to pay this assessment, and the city of Greenville filed the bill in this case to enforce its payment. Appellant demurred to the bill on the ground, *inter alia,* that the charter provisions of the city of Greenville authorizing local assessments are unconstitutional, because they arbitrarily fix the frontage of the abutting lots as the basis of assessment, and do not provide for the ascertainment of benefits to each lot from the improvement and for its assessment to the extent it is bene-

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fited. The demurer was overruled. Defendant declined to answer, and final decree was rendered, fixing the amount of said assessment against Mrs. Wilzinski and ordering the lot to be sold therefor.

Percy & Campbell, for appellant.

While local assessment for paving the carriageway portion of streets, in a municipality, is referable to the taxing power, and the improvement of sidewalks therein is usually referable to the police power, it is said in the case of *Macon* v. *Patty,* 57 Miss., 409, that "it must be remembered, however, that sidewalks are also a part of the public streets, and as such may be brought within the principle of local assessments for paving and repairs, just as the carriageway portion of the street of which they are a part. And when the municipality chooses to make and repair them in this way, the same considerations, both as to the exaction and the extent of the improvement, apply, as in the case of the improvement of the carriageway portion of the streets. It is only when the municipal authorities disregard the principle of local assessment and impose on the owners the duty of paving and keeping in repair the sidewalk in front of their lots, respectively, that the police power is exercised."

The peculiar provisions of appellee's charter, and the method pursued by appellee in making local assessments for the sidewalks in question, bring the case at bar within the principle of local assessments for paving streets, and within the taxing power, and consequently it is to be governed by the same rule that applies to local assessments for paving the carriageway portion of the streets.

That rule, according to many authorities, is that the assessment of any lot must not materially exceed the benefits it receives from the improvement. Until the case of *Norwood* v. *Baker,* 172 U. S., 269, was decided by the supreme court of the United States, we considered that, according to the weight of authority, there was no legal or constitutional objection to

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local assessments for street improvements according to what is known as the front-foot rule; but it was held in that case, substantially, that a local assessment of private property for public improvement cannot materially exceed the benefits accruing from such improvement, and that if it does it is to the extent of such excess a taking of private property for public use without compensation, and, therefore, a deprivation of property without process of law in violation of the fourteenth amendment of the federal constitution, and that, to assess the cost of improvement by the frontage rule, without any finding of fact that the property assessed has sustained benefits equal to the cost, is unlawful and violative of the constitution.

In recognition of the binding force of that decision the supreme courts in several states overruled their own decisions, which recognized the validity of local assessments according to the front-foot rule, and adopted the rule announced in *Norwood* v. *Baker;* and, in other states, the supreme courts were gratified to find that the rule announced in that case was in accord with their own sense of just principles, and furnished the only reasonable foundation for the exercise of the taxing power in respect to local assessments, as will be seen from the following cases: *Ashberry* v. *Roanoke,* 42 L. R. A., 636, and note; *Wilson* v. *Trenton,* 68 Am. St. Rep., 714; *Hutcheson* v. *Storrie,* 71 Am. St. Rep., 884; *Walsh* v. *Barron,* 76 Am. St. Rep., 354; *Adams* v. *Shelbyville,* 77 Am. St. Rep., 484.

These and many other cases, state and federal, unnecessary to cite since the decision of *Norwood* v. *Baker, supra,* have either followed the rule announced in that case or have declared their adherence to the principle which underlies it; but, after the rule announced in that case was adopted in these states, the supreme court of the United States in *French* v. *Asphalt, etc., Co.,* 181 U. S., 324, and in *Webster* v. *Fargo,* 181 U. S., 394, held that local assessments for public improvements may be lawfully made, either according to valuation or superficial area

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or frontage, and that it was not the intention of that court in *Norwood* v. *Baker* to hold otherwise.

In *Norwood* v. *Baker* some stress was laid upon the fact that the constitution of Ohio involved in that case prohibited the taking of private property for public use without compensation in money, and required the payment of such compensation without deduction for benefits to any property of the owner; and Judge George, in his masterly opinion in *Macon* v. *Patty, supra,* referred to this feature of our constitution as prohibiting local assessments in this state altogether, if there be no other foundation for the power than the equalization of the burdens with the benefits to arise from local assessment.

In searching for the true ground on which to rest the power to make local assessments for an improvement, he argued that there are both a general and a local interest in the improvement, and concluded that, to make the improvement, there must be conjoint action of those who represent the general interest and those who represent the local interest; and, speaking for himself alone, he said that he regarded it "as essential to the validity of the local assessment for a public improvement, in the use of which the general public are directly interested, and the district on which the levy is made is less than any of the regular and legal political subdivisions of the state, that the assent of the local district should be obtained."

According to the view of Judge George, as expressed in *Macon* v. *Patty*, it seems that local assessments, either according to benefits or superficial area or frontage, cannot be lawfully imposed without the assent of the owners of the property assessed, or a majority of them.

In *Walsh* v. *Barron, supra,* the supreme court of Ohio laid stress on a provision in the constitution of that state which required the legislature to restrict the powers of taxation and assessment conferred on municipalities so as to prevent their abuse.

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William Griffin, for appellee.

The charter of the city of Greenville and its ordinances with reference to sidewalks have in view the avoidance of the complicated method necessary under the code chapter, as construed in *Nugent* v. *Jackson*, 72 Miss., 1040, and *City of Greenville* v. *Harvie*, 79 Miss., 754, and keeping within constitutional limits, fully meet the requirements of sec. 80 of the constitution, and are a valid exercise of the police power, within constitutional limits, under the rule announced by Judge George in *Macon* v. *Patty*, 57 Miss., 409.

Counsel for appellant frankly admit that but for the decision in the case of *Norwood* v. *Baker*, 172 U. S., 269, there could be no objection to the constitutionality of the charter of the city of Greenville, under consideration, and the special assessment as made. They cite a number of cases following *Norwood* v. *Baker*, but also call attention to *French* v. *Asphalt, etc., Co.*, 181 U. S., 324, and in *Webster* v. *Fargo*, 181 U. S., 394, in which the doctrine announced in *Norwood* v. *Baker* is repudiated and overruled.

In the notes to *French* v. *Barber Asphalt Pv. Co.*, as reported in vol. 6, Mun. Corp. Cas., annotated, p. 1, the editor recognizes the conflict of authority on the question of the constitutionality of the "front-foot rule" in local assessments, which was thought to have been set at rest in *Norwood* v. *Baker*, but he says: "But notwithstanding the grounds on which it is sought to be distinguished, it is hard to see that the decision in *Norwood* v. *Baker* is not overruled by the principal case." And see also *Shumate* v. *Heman*, 181 U. S., 402; *Cass Farm Co.* v. *Detroit*, 181 U. S., 396; *City of Detroit* v. *Parker*, 181 U. S., 399; *Wight* v. *Davidson*, 181 U. S., 371; *Tonawanda* v. *Lyon*, 181 U. S., 389; *Webster* v. *City of Fargo*, 181 U. S., 394.

In *Cass Farm Co.* v. *Detroit*, which was an assessment based on the front-foot rule, the following appears in the syllabus as contained in 6 Mun. Corp. Cas., 37: "An assessment of the cost of paving upon abutting property in proportion to the frontage

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of such property, when authorized by the city charter and ordinances, is not in violation of the constitution of the United States." In this case Judge Shiras attempts to explain what was decided in *Norwood* v. *Baker*, and that the rule in that case was applicable "only when there is some abuse of law amounting to confiscation of property, or deprivation of personal rights, as was instanced in that case." See *Franklin* v. *Hancock*, 9 Mun. Corp. Cas., 231, authorities and note.

The case at bar in the light of the above decisions violates no provision of the fourteenth amendment of the federal constitution, and *Norwood* v. *Baker* is inapplicable, even though it be not overruled in express terms.

It will be observed that the notices prescribed by sec. 65 of the charter are by publication, and the authorities are uniform that such notice is sufficient. 2 Lewis on Eminent Domain, sec. 367. The charter is silent as to how this notice should be directed, and in the absence of any specific method in the charter the city council is authorized to prescribe by ordinance as to whom the notice should be directed to appear before the city council and show cause or objection thereto. This was done, and the publication ordered made to all persons in interest, and which includes all classes of persons. 2 Lewis on Eminent Domain, sec. 335.

"The words 'persons interested,' or their equivalent, are often used in such statutes, and have been construed as follows in New Jersey:

"Under the more comprehensive expression of 'persons interested' are included not only the person in whom is vested the legal title, which the company proposes to acquire, as indicated by their application, but also other individuals having some independent right or interest therein, not amounting to an actual legal estate, such as an easement of a right of way, inchoate right of dower, or curtesy, or encumbrances, such as by judgments or mortgages, which are charges or liens on the legal estate." *Gleason* v. *Waukeshaw*, 3 Mun. Corp. Cas., 385,

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and notes; *Goodrich* v. *Detroit,* 7 Mun. Corp. Cas., 748; *Voight* v. *Detroit,* 7 Mun. Corp. Cas., 755, and notes; *Nugent* v. *Jackson,* 72 Miss., 1040.

WHITFIELD, C. J., delivered the opinion of the court.

The question for solution in this case is: Could the city of Greenville charge a local assessment for sidewalk improvements upon the property of the appellant abutting upon the pavement, making such charge a lien upon said property according to what is known as "the front-foot rule," without limiting the amount of such assessment by the special benefits accruing to such property so charged with the cost of the improvements? The only duty we have to perform in this case is to ascertain the holding, on the point involved, of the supreme court of the United States. Volumes have been written in text-books and decisions upon the conflicting views on what is known as the "front-foot rule." *Macon* v. *Patty,* 57 Miss., 378 (34 Am. St. Rep., 451), exhausted the subject. It would be idle for us to attempt to add to the learning on the subject, and doubly idle, in view of our duty to follow the supreme court of the United States, whatever might be our opinion on the subject. In *Village of Norwood* v. *Baker,* 172 U. S., 294 (19 Sup. Ct., 196; 43 L. ed., 453), the United States supreme court, by a vote of six to three, through Mr. Justice Harlan, held: "That, while abutting property may be specially assessed on account of the expense attending the opening of a public street in front of it, such assessment must be measured or limited by the special benefits accruing to it—that is, by benefits that are not shared by the general public—and that taxation of the abutting property for any substantial excess of such expense over special benefits will, to the extent of such excess, be a taking of private property for public use without compensation." But in *French* v. *Barber Asphalt Pv. Co.,* 181 U. S., 324 (21 Sup. Ct., 625; 45 L. ed., 879), the United States supreme court, by a vote of six to three, expressly held that such assessment by the

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"front-foot" rule, although not measured by the value of the benefits received by the particular property, is not a taking of private property for public use without compensation, to the extent of any substantial excess of the cost over the benefits, and that whether such front-foot rule or other method shall be adopted is a question exclusively within the legislative discretion, over which the courts will not exercise corrective control; unless, as we understand this case, the action of the city authorities in making such assessment shall amount to "an act of confiscation." We think this exception is clearly deducible from the distinction the court seeks to draw between the cases of *Village of Norwood* v. *Baker* and *French* v. *Barber, etc., Co.* The court say on this point: "That was a case where, by a village ordinance apparently aimed at a single person, a portion of whose property was condemned for a street, the entire cost of opening the street, including not only the full amount paid for the strip condemned, but the cost and expenses of the condemnation proceedings, was thrown upon the abutting property of the person whose land was condemned. This appeared, both to the court below and to a majority of the judges of this court, to be an abuse of the law, an act of confiscation, and not a valid exercise of the taxing power." In *Webster* v. *City of Fargo,* 181 U. S., 395 (21 Sup. Ct., 624; 45 L. ed., 914), the United States supreme court again held—divided as before, six to three—"that it is within the power of the legislature of the state to create special taxing districts, and to charge the cost of a local improvement, in whole or in part, upon the property in said district, either according to valuation or superficial area or frontage; and that it was not the intention of that court in *Village of Norwood* v. *Baker,* 172 U. S., 269 (19 Sup. Ct., 187; 43 L. ed., 443), to hold otherwise." And the same doctrine was again announced in 181 U. S., 396 (21 Sup. Ct., 644; 45 L. ed., 915), the court dividing as before, six to three, in *Cass Farm Co.* v. *Detroit,* which last, however, it should be noted, is, like the case before us, a case of laying pave-

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ment on sidewalks, and not one of opening streets, as was *Village of Norwood* v. *Baker*. And so to the same effect see *City of Detroit* v. *Parker,* 181 U. S., 399 (21 Sup. Ct., 624; 45 L. ed., 917); *Wormley* v. *District of Columbia,* 181 U. S., 402 (21 Sup. Ct., 609; 45 L. ed., 921); *Shumate* v. *Heman,* 181 U. S., 402 (21 Sup. Ct., 645; 45 L. ed., 922); and *Farrell et al.* v. *West Chicago Park Commission,* 181 U. S., 404 (21 Sup. Ct., 609; 45 L. ed., 924). In the Cass Farm Company case stress is laid upon the fact that it was a paving case, and not a street opening case. In the Detroit case, *supra,* attention is called to the facts that there was no disregard of the statute of the state and the ordinances of the city; that the matter had been conducted in strict conformity to them as to notice and all else; and that there was no claim that the appellant's property had been charged differently from that of the other landowners, nor "that the portion and share of the cost for making the improvements assessed against complainant's property in point of fact exceeded the benefits accruing to such property by reason of such paving." In all these respects the case we are dealing with is like the Detroit case. In the case of the *Town of Tonawanda* v. *Lyon,* 181 U. S., 389 (21 Sup. Ct., 609; 45 L. ed., 908), the supreme court of the United States again held: "The apportionment of the entire cost of a street pavement upon the abutting lots according to their frontage, without any judicial inquiry as to their value or the benefits they receive, may be authorized by the legislature; and this will not constitute a taking of property without due process of law." We call special attention to what the court says at p. 911, 45 L. ed. (p. 391, 181 U. S.; and p. 610, 21 Sup. Ct.): "What was claimed was that a state statute which directs municipalities to assess the whole expense of paving any highway therein upon the lands abutting upon the highway so improved in proportion to the feet frontage of such lands, without providing for a judicial inquiry into the value of such lands and the benefits actually to accrue to them by the proposed

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improvement, is unconstitutional and void. And it was held by the court below that, notwithstanding the courts of the state may have held otherwise, it was its duty to follow the decision of this court in the case of *Village of Norwood* v. *Baker,* 172 U. S., 269 (19 Sup. Ct., 187; 43 L. ed., 443), which was regarded by the court below as establishing the principle contended for, and accordingly the defendants were enjoined from enforcing payment of the assessment. But we think that, in so understanding and applying the decision in *Village of Norwood* v. *Baker,* the learned judge extended the doctrine of that case beyond its necessary meaning. It was not the intention of the court in that case to hold that the general and special taxing systems of the state, however long existing and sustained as valid by their courts, have been subverted by the fourteenth amendment of the constitution of the United States. The purpose of that amendment is to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property as is afforded by the fifth amendment against similar legislation by congress. The case of *Village of Norwood* v. *Baker* presented, as the judge in the court in the present case well said, 'considerations of peculiar and extraordinary hardships,' amounting, in the opinion of a majority of the judges of this court, to actual confiscation of private property to public use, and bringing the case fairly within the reach of the fourteenth amendment. The facts disclosed by the present record do not show any abuse of the law, nor that the burdens imposed on the property of the complainant were other than those imposed upon that of other persons in like circumstances; and it is obvious, from expressions in the opinion of the trial judge, that he reached his conclusion because constrained by what he understood to be the principle established by the Norwood case." It will be observed that the court again distinguishes the *Village of Norwood* v. *Baker* case upon what it calls the "peculiar and extraordinary hardships" involved in that case. In this case our

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sole duty is, without reference to which we think the better view between these two views, to ascertain what the holding of the supreme court of the United States is, and to follow it. We understand the supreme court of the United States to now hold two things: First, that the doctrine of *Village of Norwood* v. *Baker* is to be limited strictly to the peculiar facts of that particular case, as one in which the assessment was treated as an act of confiscation; secondly, that it is not a taking of private property for public use without compensation where the legislature, or a city exercising delegated legislative power, charges the cost of paving a sidewalk as a lien upon the abutting lots of different proprietors according to the "front-foot" rule, without limiting the cost of the improvements by the special benefits received by such abutting lots, but that such levy is within the legislative discretion. The case at bar is one involving many other persons besides Mrs. Wilzinski; she, indeed, appearing to be the only one objecting. It follows from what we understand to be the doctrine now announced by the United States supreme court that the action of the learned court below in overruling the demurrer to the bill was correct.

Affirmed, and remanded, with leave to answer in thirty days from the filing of the mandate in the court below.

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JOSEPH DONOGHUE ET AL. v. NANCY A. SHULL.

1. **HUSBAND AND WIFE.** *Code* 1892, § 2294. *Transfers of property. Suits pending.*

   A transfer of property from a husband to his wife otherwise valid, under Code 1892, § 2294, regulating the subject, is not rendered invalid by the fact that suits were threatened or pending against the husband at the time it was made.

2. **SAME.** *Fraudulent conveyances. Subsequent creditors. Code* 1892, § 4228.

   Although a transfer of property from a husband to his wife was made with intent to defraud existing creditors of the husband, it is valid as to his subsequent creditors, under Code 1892, § 4228, so providing, unless made to defraud them; and hence it is valid as to a creditor who had knowledge of the transfer, consented thereto, and treated the wife as the real owner of the property so transferred before the husband contracted the debt due to him.

FROM the chancery court of Lowndes county.

HON. JAMES F. MCCOOL, Chancellor.

Mrs. Shull, the appellee, was complainant, and Donoghue and others, appellants, were defendants in the court below. From a decree in complainant's favor the defendants appealed to the supreme court.

Complainant charged that in the summer of 1892 her husband, J. G. Shull, and Joseph Donoghue, one of the appellants, entered into a contract to build a steamboat, to be paid for by them and owned by them as partners, one-third to be paid for and owned by J. G. Shull and two-thirds to be paid for and owned by Donoghue, the profits arising from the business to be divided one-third to Shull and two-thirds to Donoghue; that the steamboat was built and named "City of Columbus," and that the boat was run in the Tombigbee and Alabama rivers during the boating seasons of 1892–93 to 1898–99 under this contract, but was entirely controlled by Donoghue;

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that in October, 1894, complainant's husband, J. G. Shull, in consideration of $1,800, sold to complainant his interest in said steamboat, which sale was evidenced by written contract, duly recorded; that at the close of the boating season of 1898–99, under a contract with Donoghue and others, stockholders in the White Star Line Steamboat Company, the steamboat City of Columbus was dismantled and sold, and the owners received as compensation twenty shares of stock in the White Star Line Steamboat Company, of the par value of $100 each, one-third of the shares to be the interest of complainant and two-thirds the interest of Donoghue; that during the time the City of Columbus was in service it made quite a sum of money as profits over and above expenses, all of which were kept by Donoghue; that $1,000 of this money was used, by mutual consent, in purchasing ten shares more in the White Star Line Steamboat Company, making complainant the owner of ten shares of that stock; that over and above the money used in purchasing this stock there was left in the hands of Donoghue the further sum of $1,563.99, the net earnings of the City of Columbus, which had not been accounted for; that since the organization of the White Star Line Steamboat Company dividends had been declared to the stockholders, but by reason of the fact that Donoghue had continued in the sole possession of the books covering the interest of himself and complainant and in possession of the certificates of stock, except six shares, complainant is ignorant as to how much she is entitled to have paid her; that six shares of this stock were issued to complainant, signed by Joseph Donoghue, president, and Newman Cayce, secretary, of said company, on September 18, 1901, upon which a dividend of $120 was paid her May 30, 1902, thus leaving four shares of stock undelivered to her, which she is now entitled to have delivered to her by Donoghue or the White Star Line Steamboat Company; that in December, 1899, her husband borrowed some money, and that Donoghue signed a note as surety for her husband, and to secure said Donoghue she con-

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sented for Donoghue to retain as collateral security four shares of her stock in the White Star Line Steamboat Company; that her husband failed to pay the note, and Donoghue was forced to pay it and the interest on it, but that it was paid with money belonging to complainant then remaining in the possession of Donoghue, being the accumulated profits on her interest in the steamboat City of Columbus; that the four shares of stock had been thus redeemed, and should be released. Complainant prays for an accounting between herself and Donoghue of the business of the City of Columbus since she purchased her husband's interest in the boat, and for the dividends on her stock in the White Star Line Steamboat Company since its organization, and for the surrender to her of the four shares of the stock in that company still withheld from her. Donoghue answered, admitting the execution of the contract with J. G. Shull, complainant's husband, to build and operate the boat, the City of Columbus, as alleged in the bill, except that this contract was entered into in 1893 instead of 1892, and alleged that he paid $216.02 of the one-third agreed to be paid by said J. G. Shull, and charged that sum to him; admitted that he controlled and managed the boat all the time it was in business; denied that he ever had any agreement with Mrs. Shull as the owner of the City of Columbus, but averred that all his dealings were with her husband, J. G. Shull. He admitted that there was an apparent transfer of the interest of J. G. Shull in the boat, the City of Columbus, about the time alleged in the bill, but charged that it was not made in good faith, or for any valid consideration, but that just prior to this transfer said J. G. Shull came to him and told him that he (Shull) was indebted in a considerable sum to a party in Columbus, and he feared his interest in the boat would be seized and sold, and asked permission to transfer his interest in it to his wife, Mrs. Shull, to which respondent consented, and that the transfer was afterwards made to her for that purpose; that J. G. Shull continued to manage and control the business just as he had done before.

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He admitted that the City of Columbus was dismantled and sold, and stock taken in the White Star Line Steamboat Company, as alleged in the bill, but averred that this agreement was made with J. G. Shull, and not with complainant. He admitted that there was a balance in his hands of $1,553.39, after purchasing the ten shares of stock, of profits arising from the business of the City of Columbus, and averred that the one-third interest was the property of J. G. Shull, and was credited on his account. The answer averred that all the time J. G. Shull was in debt to respondent in a considerable amount, and it was agreed and understood that the interest of J. G. Shull in the City of Columbus and in its earnings as represented by the shares of stock in the White Star Line Steamboat Company should be held by respondent as collateral security for his debt, which has never been satisfied; that the thirty shares of stock in the White Star Line Steamboat Company were originally issued to respondent, and so remained in his name until September 18, 1901, at which time respondent directed that six shares of the stock be issued to complainant, the other four shares being still held as security for the indebtedness of J. G. Shull still unpaid. He admitted that he signed the note as surety for J. G. Shull, and admitted that J. G. Shull and complainant executed in writing an assignment of the four shares of stock, as alleged in the bill, to respondent as collateral security, but averred that it was signed by Mrs. Shull because the legal title thereto was in her name. He denied that the money paid by respondent as J. G. Shull's surety had been refunded to him. He admitted that the dividend on the six shares of stock was paid to Mrs. Shull, as alleged in the bill. Respondent made his answer a cross-bill, asking that the four shares of stock still held by him be sold to satisfy the indebtedness of J. G. Shull still due him. J. G. Shull answered, admitting all the material allegations of the bill. Mrs. Shull answered the cross-bill, denying the allegations therein contained. On the bill, cross-bill, and answers considerable testi-

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mony was taken, and the chancellor rendered a decree in favor of complainant granting her a decree for part of the money claimed, and ordering the four shares of stock in the White Star Line Steamboat Company to be delivered to her.

Newman Cayce, for appellants.

Thomas J. O'Niell, for appellee.

TRULY, J., delivered the opinion of the court.

The chancellor found that a valid debt was due and owing by J. G. Shull to Mrs. Shull, his wife, and that the transfer of the interest of the husband in the steamboat City of Columbus was in satisfaction of that indebtedness. Accepting this finding of fact as true, the transfer, which was evidenced by writing, duly acknowledged and recorded as required by § 2294, Code 1892, was not invalidated or rendered fraudulent because of suits threatened or pending against the husband. *Savage* v. *Dowd,* 54 Miss., 732; *Graham* v. *Morgan,* 83 Miss., 601 (35 South. Rep., 874). Appellant cannot be heard now to contend that the interest formerly owned by J. G. Shull should be held liable for the personal debt due him by said Shull. Appellant was aware of the transfer by Shull to appellee at the time it was consummated. He was fully advised with reference thereto, and consented that the property should be transferred. Appellant recognized appellee's title by having a portion of the capital stock reissued in her name and by obtaining from her a written pledge by assignment of other shares of stock to secure a note which he had indorsed for her husband. Conceding that the transfer was in fact made with intent to defraud existing creditors, it was not void as to a subsequent creditor who was cognizant of the whole transaction and had dealt with the wife as the real owner for several years before any debt was contracted with him. Code 1892, § 4228.

Affirmed.

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SANDERS BRADFORD v. ELIZABETH TAYLOR.

1. MASTER AND SERVANT. *Injuries to employe. Assumption of risk.*
   While an experienced employe is presumed in law to have assumed the risk ordinarily incident to the employment, yet one who is familiar with the general details of a business may be shown to be a novice in the operation of the machinery by which the business is carried on, and thereby relieved of the presumption.

2. SAME. *Vice principal. Fellow-servant.*
   Where a servant was injured by the negligence of a vice principal in leaving a protective attachment off of a machine and in starting the machine without giving the servant warning of danger, the acts causing the injury were not, as a matter of law, performed by the vice principal while acting as a fellow-servant of the injured party.

3. SAME. *Damages. Erroneous instruction.*
   Error in an instruction informing the jury of their right to award exemplary damages will not compel a reversal of a judgment in plaintiff's favor for a sum not exceeding fair compensation for the injury suffered.

FROM the circuit court of Lowndes county.

HON. EUGENE O. SYKES, Judge.

Mrs. Taylor, the appellee, was plaintiff in the court below; Bradford, the appellant, was defendant there. From a judgment in plaintiff's favor for $1,000 and costs defendant appealed to the supreme court.

The case was heretofore in the supreme court on a former appeal, and is reported—*Taylor* v. *Bradford,* 83 Miss., 157.

The declaration sets up negligence in defendant in failing to provide and have attached to a machine for ironing collars and cuffs a fender, and the negligence of the foreman of the laundry, employed by appellant, in setting the machine in motion while plaintiff was engaged in cleaning an iron roller, part of the ironing machine, at a time when the foreman had diverted plaintiff's attention from the machinery. The evi-

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dence for plaintiff was, in substance, as follows: Plaintiff was employed by defendant to work in his laundry. She had several years' experience working in laundries, but none with running machinery. One Zackariah Hartzell was employed by defendant to work in, and he was the foreman and general manager of, the laundry, defendant rarely coming to the plant, Hartzell having control of everything and everybody. Plaintiff was engaged in cleaning the iron roller of the ironing machine in the laundry, and her hand was caught between the upper and lower roller, and her arm was drawn into it, and was severely crushed and bruised, causing the elbow joint to become stiff. Plaintiff's duty about the laundry was to starch the shirts and bosoms and collars and wipe them off and place them in the drying room, to look after the ladies' clothes and starch them; had nothing to do with running the machinery. At the time plaintiff began to clean the roller the machinery was not running. The fender was off the roller, which was necessary to protect the hands and keep them from getting in between the rollers. Plaintiff testified as to the accident as follows: "I was cleaning the machine—part of my regular work—when Mr. Hartzell kicked the lever and started the machine, and the roller above the iron caught my hand and jerked my arm between the roller and the ironer, crushing the bone of the elbow joint; and when he started the machine, he told me to clean it. He stepped in behind me just a moment afterwards, and asked me about some work that had to be gone over, and I turned my head to see what it was, and the roller above the ironer caught my arm." She also testified that she had, previous to the accident, called Hartzell's attention to the absence of the fender; that there was a fender in the building, but it had never been put on the machine. The sixth and seventh instructions given for plaintiff are as follows:

"6. The jury are allowed—and, indeed, it is their duty in such cases as this, where the law provided no other penalty—to consider the interest of society, as well as justice to the plaintiff,

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and by their verdict, while they make just compensation, also inflict proper punishment for the disregard of public duty, if they should feel justified by the evidence.

"7. The law devolves the power on the jury, as a matter of sentiment and feeling, to be exercised by them according to their sound discretion, duly weighing the circumstances of the case and considering the state, degree, quality, trade, or profession, as well of the party injured as of him who did the injury."

Z. P. Landrum, for appellant.

To show that the appellant was not a novice in the use of this machine we point, first, to the allegation in her declaration that she was an expert laundress; and she could not have been an expert laundress and at the same time have been a novice in the use of this machine. We point next to her statement in her testimony that she had five years' experience as a laundress. Surely five years' experience as a laundress, use of ironing machine at I. I. & C. laundry, Avondale laundry, cleaning roller in Birmingham laundry, seeing feeder or fender at Empire laundry and Newby's laundry—surely all this is sufficient to overcome appellee's bare statement that she was a novice. "Words are but empty sounds; actions live in records." Can it be pretended that, with all this experience, this appellee was a novice in the use of this machine? On the contrary, her own testimony shows conclusively that she was an expert laundress.

Appellee says in her testimony that she saw this feeder—or fender, as she calls it—every day she worked at the marking table, which the testimony elsewhere puts five or six feet from the machine. Hartzell says in his testimony that a child could have instantly adjusted this fender, and Brent, plaintiff's own witness, says the only difficulty in adjusting it with one hand is to get the slots in. Now there it was, this fender, there within five or six feet of the roller; there she saw it every day

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while she was at the marking table, a mere child could have adjusted it; and yet, never having seen anybody try to clean a roller without this appliance adjusted in the laundries at Avondale, Birmingham, I. I. & C., and Newby's, she chose to leave it off when she started to clean this one. Can she complain? 2 Labott's Master and Servant, p. 1735, secs. 597, 604; and p. 1772, sec. 613, and notes.

Hartzell, an expert, says that this feeder or fender ought to be taken off when cleaning the roller, and that its only use is as a feeder to expedite the ironing of collars and cuffs; that this machine would not be defective for cleaning if feeder or fender was off; that the machine was new and up-to-date in every respect; and that there was no chance to get hurt in cleaning this roller without gross carelessness. Brent, an expert, and appellee's own witness, says that this fender through which collars and cuffs are fed is commonly taken off in cleaning the roller; that "it is more handy" to clean the roller without feeder or fender, and that he always took the fender off when cleaning the roller. In view of such testimony, can it be said that this roller was not ordinarily safe for cleaning without this feeder or fender? If the roller was ordinarily safe for cleaning, the law is satisfied. Labott's Master and Servant, p. 110, sec. 44, *et seq.*, and notes.

As to the alleged negligent act of Hartzell, appellant's vice principal so-called, in setting the roller in motion and diverting appellee's attention, when she started to clean this roller, we remark that on the face of it this was impossible, and is but a part with the rest of this cunningly devised fable. Hartzell says that the roller had been in motion full five minutes before appellee's hand and arm were caught, and that he had marked a number of collars and cuffs five or six feet away. And appellee says in her own testimony that after Hartzell (not she) had set the roller in motion and walked five or six feet away to the marking table, he spoke about her doing some collars and cuffs, and she turned her head toward him, and her arm was caught.

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Does this testimony in any way support the allegation of the negligent act of Hartzell in suddenly starting the machinery and diverting appellee's attention? Absurd! On the contrary, it shows appellee's own negligence most clearly.

The testimony shows beyond any doubt that plaintiff was hurt by her own negligent act in attempting to clean this swiftly revolving roller or mangle with her long apron instead of with rags put there for the purpose, thereby getting her hand and arm carried in with the apron between the rollers and crushed before assistance could reach her. And under the testimony this is the only way she could have suffered this accident.

Orr & Harrison, for appellee.

On a close scrutiny of the testimony it will be seen that every branch or section in the long sentence of Judge Truly's opinion, when the case was here before, 83 Miss., 157, is fully, distinctly, and squarely met by the testimony of the witnesses for the plaintiff. If this assertion is true, how can there be any error in the judgment now sought to be reversed? Judge Truly presents in the opinion of the court the substance of plaintiff's declaration in a condensed and perspicuous form, and concludes with the statement that the facts, if proven, would entitle plaintiff to a verdict. To that end the energies of plaintiff were directed, and if a single point is omitted in the elements fixing the liability of the defendant, it will require a larger telescopic vision to discover it than that used by the astute counsel representing Bradford in the court below.

As to the extent of the injury, Mrs. Taylor says: "The arm was jerked in up to my body, crushing my arm up to the elbow. I cannot tell you in words how much I suffered. Can dress, undress, and feed myself with difficulty. I was hurt through the carelessness of Mr. Hartzell in starting the machine. It was about five months before I could work or do anything. My arm is permanently disabled."

Dr. Halbert says: "The humera bone of Mrs. Taylor's arm

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is broken. I do not think it will ever be as sound as the other." Dr. McCullough says: "I do not think she will ever have the use of the arm she once had."

We have thus presented to the court the plaintiff's case as made out in the court below, in direct conformity to the opinion of this court in adjudicating the case while it was here on demurrer to plaintiff's declaration. It is true that Bradford, the defendant, and his foreman and manager, Hartzell, deny nearly all the allegations of plaintiff and her witnesses. We expected them to do this. For that reason we brought disinterested witnesses, who in every material point sustain Mrs. Taylor in her straightforward and consistent testimony. As to the use of the fender and the defective appliances, the contention of the plaintiff is fully supported by the expert Brent. As to the carelessness and reckless conduct of Hartzell, the vice principal, in starting the machinery whilst the novice and inexperienced person was cleaning the roller, Mrs. Taylor is abundantly supported by McDowell and Miss Anna Taylor. As to the permanency of the injury to her arm, she is ably supported by the two physicians, Halbert and McCullough. But no matter how many denials were made by Bradford and Hartzell, the jury accepted as true the testimony of Mrs. Taylor. The judge below evidently thought the jury read the character of the witnesses and their testimony aright, as he refused a new trial. The only error in the verdict was that it was for too small an amount.

TRULY, J., delivered the opinion of the court.

The proof upon this trial fully sustained all the material allegations of the declaration, and upon the former appeal herein it was decided that the declaration in the case presented a good cause of action. It is argued that appellee is not entitled to recover because the proof shows that she was an experienced laundress, and is therefore in law presumed to have assumed the risks ordinarily incident to such occupation. As a general

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legal proposition, this is sound, but it has no application to the case at bar, for this reason: The testimony, which the jury decided to be true, shows that, while appellee was familiar from previous experience with the general details of laundry work, she was a novice in the operation of machinery, and ignorant and without experience in the use of the particular defective machine by which she was injured, which was by the master negligently permitted to remain in an unsafe and defective condition, and which the appellee had been, by her vice principal, misled into believing to be safe. Risks so arising were not incident to her employment, and she had the right to rely upon the representations of her vice principal. The proof showed that the appellee was injured by the negligence of her vice principal, standing in the relation of master to her. The contention that in the commission of the particular act causing the injury the vice principal was acting in the capacity of a fellow-servant with appellee is not tenable. The injury was caused conjointly by the negligence of the master in leaving off a necessary protective attachment from the machine by which appellee was injured and by the act of the vice principal in starting the machinery without warning to appellee and distracting her attention so that she was unaware of the peril of her situation. The act of the vice principal in starting the machinery was in no sense the act of a fellow-servant with appellee. The record plainly discloses that the machinery was solely in the charge of the vice principal, and the operation thereof no part of the duty of appellee.

The sixth and seventh instructions for appellee are erroneous, and ought not, strictly speaking, to have been given under the facts of this case; but inasmuch as the amount of the verdict found by the jury does not exceed, or in fact measure up to, the compensation which appellee was entitled to recover, it is manifest that they did not prejudice the rights of appellant. Wherefore the error is not of sufficient importance to justify the reversal of a cause in which the right result has

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been reached and the damages awarded are by no means excessive.

Affirmed.

BENJAMIN FRANKLIN DAVIS v. STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Murder. Evidence. Error in admitting. Exclusion. Curative effect.*

 The vital question in a prosecution for murder being whether defendant or deceased was the aggressor, and the evidence on the subject sharply conflicting, the error of admitting hearsay evidence to the effect that defendant had threatened deceased was not cured by its subsequent exclusion, with direction to the jury to disregard it.

2. SAME. *Witnesses. Impeachment. Collateral matters. Relevancy.*

 The defendant in a murder case and his wife having testified that she did not, after the killing, say to him in the presence of third persons, "If you had listened to me, you would not have gone down there and the man would not have been killed," it was error to allow the state to contradict them, since their testimony on the subject related to a collateral and irrelevant matter.

3. SAME. *Argument to jury. Reading parts of the testimony.*

 In a prosecution for crime the district attorney should not be permitted to read to the jury portions of the testimony as written out by the official stenographer.

FROM the circuit court of Attala county.

HON. WILLIAM J. LAMB, Special Judge.

Davis, the appellant, was indicted and tried for the murder of James Rickles, and was convicted of manslaughter, and appealed to the supreme court. The facts upon which the decision turned are sufficiently apparent from the opinion of the court.

[The original and main brief of appellant's counsel and the brief of counsel for appellee were withdrawn from the record, mislaid, or lost before the transcript came to the hands of the reporter. The reporter, however, found an additional, or sup-

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plemental, brief for appellant, the synopsis of which is given below.]

S. L. Dodd, and *Teat & Teat,* for appellant.

It was fatal error in the court to permit the district attorney, in his final argument to the jury, to read to the jury the type-written notes prepared by the stenographer at his request, and to tell the jury that the same was the exact language and testimony of the witnesses, when in truth and in fact, as plainly shown by the record, he only read portions of their testimony to the jury, and not all of it.

Here was a great abuse of the province of the district attorney. He had no right to read the stenographer's notes to the jury, much less only broken sections and disconnected portions of the testimony, and then, over objection of appellant, to say to the jury that what he read was the precise testimony of the witnesses.

Again, there is nothing to show in the record that the written matter read to the jury had been properly authenticated by the stenographer, but only the declaration of the district attorney that he had caused the stenographer to write out the testimony of the witnesses in part. Here we have a record read to the jury, over the protest of the appellant, an incomplete document which did not purport to be official, read in the closing argument, without appellant's counsel being afforded a chance to read or have read to the jury any of the parts of the statements which were omitted by the district attorney.

Now the appellant distinctly assigned this as error in his motion for a new trial, and we insist it was highly prejudicial to the rights of the appellant, and a great abuse of power by the district attorney, and which was used, as the record shows, in a highly vehement and inflammatory way.

William Williams, attorney-general, for appellee.

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TRULY, J., delivered the opinion of the court.

The action of the court in permitting Mrs. Rickles, the wife of the deceased, to testify that after the homicide she had heard one Richardson state that the defendant had made threats against the deceased, was palpable error. The trial judge evidently realized the error committed, for at a subsequent stage of the trial, of his own motion, he excluded from the jury the testimony in reference to the threats. But we cannot confidently affirm that this undid the evil effect of the erroneous admission of the evidence. With this plainly incompetent hearsay testimony stricken out, there was no evidence that appellant had made any threats against deceased. Richardson, the party whom Mrs. Rickles claimed to have heard make the statement in reference to threats by the appellant, was not introduced as a witness, so all the testimony bearing on threats rested solely on this confessedly erroneous ruling. Under the facts of this case it was vital to the appellant's defense not to have the jury improperly influenced in deciding the mental attitude occupied by himself and the deceased at the time of the homicide. The crucial question which the jury was called on to decide was: Who was the originator of and aggressor in the difficulty at the scene of the homicide which resulted in the death of Rickles? As tending to shed light on the pivotal point, any testimony of antecedent malice or previous preparation on the part of either of the combatants was important. The eyewitnesses were few, the conflict in their testimony sharp. In such a case the court erroneously threw, on the side of the state, the weight of this incompetent testimony of alleged threats. In a case so evenly balanced, this was sufficient to turn the scale against the accused.

The defense relied on by the appellant was that the deceased on the occasion of the homicide had armed himself for the purpose and with the deliberate intention of carrying into execution the threats which he had made to appellant's wife the day before; but the action of the court in admitting the testimony

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referred to discredited this defense, and presented to the jury on behalf of the state a theory not supported by any legal testimony—that is, that the deceased was armed, not for the purpose of executing his own threats against the appellant, but in order to protect himself against threats made by the appellant. Viewed in this light, the case falls clearly within the condemnation of the rule announced in *Chism* v. *State,* 70 Miss., 742 (12 South. Rep., 852), and *Railroad Co.* v. *Ely,* 83 Miss., 519 (35 South. Rep., 873).

It was error to permit the district attorney to contradict and impeach the appellant and his wife upon a collateral matter, as was done by the testimony of the two Carter witnesses. The rule which forbids a witness to be impeached upon a collateral matter, and the sound and just reasons on which that rule is founded, have been so fully, frequently, and recently discussed and announced by this court that a statement of the fact is sufficient to demonstrate the error. Appellant and his wife, when testifying as witnesses, were asked, over objection, if on a certain occasion, in the presence of Mr. and Mrs. Carter, the wife had not said to her husband, "If you had listened to me, you would not have gone down there, and the man would not have been killed." Both denying this statement, the state was permitted to introduce the two Carters, who testified that such remark had been made by Mrs. Davis to her husband on the occasion stated. This testimony clearly fails to measure up to the test established in *Williams* v. *State,* 73 Miss., 820 (19 South. Rep., 826), and as subsequently approved and followed in every case bearing on this question since that time. See *Garner* v. *State,* 76 Miss., 515 (25 South. Rep., 363); *Dunk* v. *State,* 84 Miss., 452 (s.c., 36 South. Rep., 609). The testimony was not only improperly admitted, but was of itself incompetent and irrelevant. It tended in no way to throw light upon the homicide. The defendant might have admitted that his wife warned him not to go where Rickles was, because of her solicitude for his safety and her fear that Rickles might execute the threats

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against the life of her husband, which, coupled with abuse of herself, he had uttered only the day before. But, introduced for the express purpose of impeaching appellant and his wife as proof of contradictory statements, this testimony, with the sanction and approval of the court, went to the jury as tending to show that the statements of appellant and his wife were false and fabricated, and conveying the implication that in truth the appellant had gone to the scene of the homicide with a deadly intent, with the full knowledge, but over the protest and against the admonition, of his wife. Nor was this testimony admissible upon the idea that it was a statement made in the hearing of the defendant against his interest, and not denied by him. It is not a statement against his interest. It accused him of nothing, and made no charge requiring denial or contradiction. As well said in the Garner case, *supra,* had the wife been placed upon the stand as a witness, she would not have been permitted, as direct testimony, to have testified that she had made such statement, and therefore the state was improperly permitted to thrust into the minds of the jury by indirect methods what it was forbidden to introduce directly.

We advert to, for the purpose of discountenancing, the practice of allowing the district attorney to have the testimony of a witness or witnesses, or such portion thereof as he may desire, written out by the official stenographer, and then reading the portion so selected by him to the jury as a part of his closing argument. Counsel for the state or for the defendant are, of course, permitted to take notes of testimony as voluminous as they may wish, and refer to the same in the course of argument. But in the case at bar the testimony of certain witnesses as detailed upon the stand, with all the force and effect of absolute accuracy and verity which is implied by the certificates of the court stenographer, were rehearsed to the jury, not as the remembrance of the attorney of what the witnesses had stated, but as an exact and official repetition of the very language. The effect of this was that, after the witnesses had all testified,

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after the arguments for the defendant were all concluded, the minds of the jurors were again impressed by a rehearsal of such parts of the testimony of such witnesses as the district attorney thought would best serve the purpose of his closing argument for the prosecution. This, in our judgment, is not just to counsel for defendant, who have opportunity neither for denial, explanation, nor reply, and places an undue burden upon the cause of the defense. We do not decide that this alone, in the case at bar, would constitute reversible error, but, as the case must be reversed for reasons already indicated, we refer to this, so that it may be avoided upon another trial. The cause of justice does not require any addition to the already great advantage given the state by the closing speech, especially when the same is delivered by a prosecutor so eminently eloquent, vigorous, and forceful as the one who guarded the interests of the state in the case at bar.

Reversed and remanded.

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JACOB S. WAGNER v. BENTON S. ELLIS.

1. **EVIDENCE.** *Objections. Supreme court practice.*
   Unless objection be made in the trial court to the proof of the contents of a writing by parol evidence, complaint thereof in the supreme court will be unavailing.

2. **SAME.** *Objections must be seasonable and specific.*
   Objections to testimony must be seasonably interposed and made sufficiently specific to present, and not to obscure, the question involved.

3. **SAME.** *Concrete case.*
   A defendant who, without objection, permitted plaintiff to prove the contents of a writing by parol, cannot make the admission of such proof the predicate of an assignment of error in the supreme court, although in the course of the examination of a plaintiff's rebutting witness he made a general objection, which was overruled, to an inquiry touching the contents of the writing.

4. **SAME.** *Excessive verdict.*
   A judgment on a verdict in excess of the damages proved will be affirmed by the supreme court only on condition of appellees remitting the excess.

FROM the circuit court of Jefferson county.

HON. MOYSE H. WILKERSON, Judge.

Ellis, the appellee, was plaintiff, and Wagner, the appellant, defendant in the court below. From a judgment in plaintiff's favor for $300 and costs, the defendant appealed to the supreme court. The suit was to recover damages suffered by plaintiff because the defendant enticed away plaintiff's tenant, one Calvin Paxton, whereby plaintiff lost the rent of his agricultural land, and the land was damaged by growing up in weeds, etc. It seems that the proceeding was predicated of Laws 1900, ch. 102, p. 140.

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Hicks & Shelton, for appellant.

We submit, in the first place, that the contract for the lease of the land to Paxton by Ellis, being, as stated by him, for a period of three years, must have been in writing to be a legal, valid, and subsisting contract, and if such a contract was ever made in writing, as the law requires, it has never been introduced in evidence in this case, and is not now before the court. It is true that Ellis testified that a contract in writing was made with Paxton, and a contract was handed him which he identified as the contract, but it was never offered in evidence, and the court does not now know from any legal evidence what the contents of this contract were, nor that it was such a contract as the law requires. The burden of proof was upon the plaintiff, and it is shown by the testimony of Ellis that such a contract was in existence, but it was never offered in evidence, and oral evidence cannot be substituted for any instrument which the law requires to be in writing. 1 Greenleaf on Ev., sec. 86.

Again, we submit that the court erred in permitting Ellis to testify, over the objection of Wagner's counsel, to a part of the contents of a written contract claimed to have been made between Wagner and Paxton, the tenant. The award of three hundred dollars damages is excessive and unwarranted by the proof.

Corban & Easterling, and *J. B. Webb,* for appellee.

Appellant allowed parol evidence of the contents of the writing to go to the jury without objection. If he had objected, and it had been necessary for the contract to have been introduced instead of its contents stated, we would have filed the instrument if the court had so required. Appellant cannot now complain. *Storm* v. *Green,* 51 Miss., 103.

The court did not err in allowing Ellis to testify as to the contract between Paxton and Wagner, which Ellis said was in the possession of Wagner. Wagner had the contract, and he could have produced it.

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WHITFIELD, C. J., delivered the opinion of the court.

It is insisted that the court erred in allowing the plaintiff to prove by parol the contents of the written contract between Ellis and the tenant, Paxton, which contract was in writing, and was identified on the trial as the contract by Ellis. But the answer to this is that no objection whatever was made in the court below to the parol evidence. The contract ought to have been offered regularly, and, doubtless, if objection had been made to the parol proof, the contract would have been put in evidence.

It is also objected that the court should not have permitted Ellis to testify to the contents of the written contract between Wagner and Calvin Paxton, which contract Wagner made no effort to have on the trial. The state of the record on this is as follows: No objection whatever was made, when Ellis was first examined, as to his stating the contents of this contract. After the defense had concluded its testimony, Ellis was recalled in rebuttal, and asked to repeat his testimony as to what the contract was, or, rather, what names were signed to that contract. This was to contradict Wagner, who testified that he had no contract with Calvin Paxton, but that Tom Dixon had a contract with Calvin Paxton. Then, for the first time, the defendant objected to this testimony. But Wagner had himself, in chief, stated that there was such a contract between Dixon and Calvin Paxton. This objection was overruled, and, very probably, on the ground that it was offered to contradict Wagner, and it is to be noted that the objection did not specify upon what ground it was made; it may have been made—and from the course of the trial, since Ellis' testimony had not been objected to when it was first offered, it probably was made—on the ground that it was not rebutting testimony, in so far as it repeated his testimony in chief as to the contents of the contract. In view of this, the objection came too late, and was too general in its character. But, in addition to this, the defense had itself proved the contract between Dixon and Paxton by Wagner

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himself, and also Calvin Paxton, and the testimony clearly shows that Dixon was the agent on land leased by Wagner to him, and liable to Wagner both for rent and supplies. And, finally, Wagner admitted that he had made no search for the contract, or any inquiries whatever as to where it was. Under the circumstances the contract was under the control of Wagner, and ought to have been produced by him. We do not think on this state of the record that this assignment was well taken. Objections should state the ground on which they are made, and be seasonably interposed.

But the verdict was plainly excessive. It was proper to allow the value of the rent Ellis lost, amounting to $201, and it was also proper to allow the damage to the fifteen acres which were not cultivated, and grew up in weeds and briers, which would be in amount $45. The total amount which might thus properly have been allowed would be $246, but the jury rendered a verdict for $300 for the plaintiff.

If the plaintiff will remit $54, *the judgment will be affirmed; otherwise the case will be reversed and remanded.*

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Syllabus.

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THOMAS B. BARMORE v. VICKSBURG, SHREVEPORT AND PACIFIC RAILWAY COMPANY.

1. MASTER AND SERVANT. *Torts of servant. Scope of employment. Question of law. Question of fact. Evidence.*

   If there be no conflict in the evidence, the question whether a servant whose wrongful act caused injury to a stranger was acting within the scope of his employment, is for the court; but if there be conflict, then the question is for the jury to decide.

2. SAME. *Responsibility of master. Departure from service.*

   In such case it must be shown, in order for the master to escape liability, that the servant, when the wrongful act complained of was committed, had abandoned his employment and gone about some purpose of his own not incident to his employment.

3. SAME. *Railroads. Concrete case.*

   Where an employe of a railroad, whose duty it was to attend to a steam pump, supplying water to a tank, was furnished with a railroad tricycle which he used to gather kindling along the right of way, went to a certain point where it was plentiful, but deviated from his purpose to gather the same after reaching the point, and carried a sick friend on the tricycle therefrom to a station beyond, and while returning, but before reaching the point at which he had taken up his sick friend and deviated from his employment, negligently ran the tricycle against and struck plaintiff, the railroad was liable for his so doing, since the responsibility of the railroad company for his acts attached immediately upon his having accomplished the errand on behalf of his friend and when he started to return to his duty to gather kindling.

4. SAME. *Dangerous instrumentality.*

   A master who intrusts to a servant the custody of an appliance which, by reason of its nature or the method of its operation, is dangerous or liable to inflict serious injury upon others, cannot avoid responsibility for injuries inflicted in the operation thereof on the ground that the servant, in the particular act complained of, was acting outside of the scope of his employment.

5. SAME. *Question for jury.*

   Whether a railroad tricycle, speeding along the track, is a dangerous instrumentality, within the rule holding the master

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liable for injuries caused by a servant in the use of a dangerous instrumentality, whether in being where he was on the track he was acting in the scope of his employment or not, is a question for the jury.

6. SAME. ***Railroads. Liability to trespasser on track.***

A railroad is liable for injuries to a trespasser on its track, notwithstanding his contributory negligence, where they are caused by the gross negligence of its servant, who, with knowledge of the trespasser's perilous situation, wantonly injured him.

FROM the circuit court of Warren county.

HON. GEORGE ANDERSON, Judge.

Barmore, the appellant, was plaintiff, and the railway company, the appellee, defendant in the court below. From a judgment in defendant's favor, the plaintiff appealed to the supreme court. The facts are stated in the opinion of the court, and also in the dissenting opinion of the chief justice.

Snyder & Gilfoil, for appellant.

If it be admitted that Watson had no business to propel the tricycle east of Cow Bayou trestle, and that when he passed across it he was engaged on business of his own, to accommodate a sick acquaintance with a ride to Waverly, and that the defendant, having furnished him with this dangerous machine and practically a free track to run it on, is charged with no liability for his misuse of the machine, and the running of his machine beyond his territorial limits, yet the facts that he left his tank for the purpose of procuring kindling for his engine; that he went beyond the place where the kindling lay, with the intention and purpose of gathering the kindling on his return; that he was on his return trip, in the performance of his duty to return the tricycle to the place where it belonged, and in the further performance of his master's business, intending to gather the necessary kindling when he arrived at the place where it was, show conclusively that this employe was, at the time of the injury, in the function to which he had been appointed, engaged

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in his master's business, and in the performance of the duties he owed his master.

The position taken by the defendant in the court below, in its last analysis, is simply this: If the injury had been occasioned when Watson was bound east toward the kindling for the purpose of gathering it, the master would be liable; but as he was approaching the kindling from the other side, from the east, although animated with the same purpose of gathering it to fire his master's engine, which was his business, the master cannot be held.

We submit that it is inconceivable that this can be the law. The cases urged by defendant in support of its point of view of non-liability of the master are all based upon facts which show that the act was done while the servant was at liberty from his service and pursuing his own ends exclusively. And the doctrine relied on in cases cited by defendant has been greatly modified.

Where the servant is in the performance of even the slightest duty to the master, the master is held liable. In the case cited in the brief of our associates, and the latest we are able to find on the point, and very much in support of our position, *Weber* v. *Lockman,* 60 L. R. A., 313, the court says: "The boy was a minor, riding his father's horse. It was his duty, after having executed his mission, to return the animal to his father's stables. Whatever negligence there was in departing from the direct route, or in delaying his return until after nightfall, or in the management of the horse at the time of the accident, was committed in performance of this duty and service."

The supreme court of Louisiana in the case of *Dorsey* v. *Railway Co.,* 104 La., 478 (52 L. R. A., 92), the latest expression from that court on this subject, says: "We take it that the rule exempting the master from responsibility is expressed in the following: 'When the employe, in carrying out a purpose of his own, does injury to another, not within the scope of his employment, the employer is not liable.' "

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On the proposition that the master is liable for the damage and injury caused by the misuse by his servant of a dangerous instrument, machine, or agency, which it has placed in his hands and over which it has given him exclusive control, the following cases are in point: The case of *Nashville & C. R. Co.* v. *Starnes,* in which the court said: "Railroad corporations only act through agents; and having placed in their hands such deadly instruments, the law demands of them the utmost caution in the selection of agents, and holds them strictly accountable." 9 Heisk. (Tenn.), 52 (19 Am. Ry. Rep., 280).

"Where the servants of a railroad in the discharge of their duties pervert the appliances of the company to wanton and malicious purposes, to the injury of others, the company is liable for such injury." *Chicago, B. & Q. R. R. Co.* v. *Dickson,* 63 Ill., 157 (7 Am. Ry. Rep., 45), following *Toledo W. & W. R. Co.* v. *Harmon,* 47 Ill., 298; *Railroad Co.* v. *Shields,* 44 Am. & Eng. R. Cas., 647 (8 L. R. A., 464); *Alsever* v. *Minneapolis & St. L. Co.,* 56 L. R. A., 748; and in *Euting* v. *Chicago & Northwestern R. Co.,* 60 L. R. A., 158.

McLaurin, Armistead & Brien, on same side.

Weber v. *Lockman* (Neb.), 60 L. R. A., 313, decided in November, 1902, is in point. This was an action against defendant to recover damages for personal injuries caused by the negligence of defendant's son, acting in the capacity of a servant for his father, for which defendant was alleged to be responsible.

In *Cosgrove* v. *Ogden,* 49 N. Y., 225 (10 Am. St. Rep., 361), it is said: "The test of the master's responsibility for the act of the servant is not whether such act was done according to the instructions of the master to the servant, but whether it was done in the prosecution of the business that the servant was employed by the master to do."

In the case at bar the act was done while the servant was en route to pick up the kindling necessary to start his fires. It

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seems to us that he was certainly at the time about his master's business. In the case of *Fitzsimmons* v. *Railroad Co.,* 57 N. W., 127, a case where a railroad engineer violated the express orders of the company and ran his engine from one station to another, it was said he was still acting within the lines of his employment, and plaintiff, the passenger injured by his wrongful conduct, recovered of the defendant company. It will be noted, too, from an examination of the case, that a recovery was had, and based on the ground that the engineer was still in the line of his employment, although conducting the business of his master in violation of his master's orders, and not because of the fact that the party injured was a passenger on another of defendant's trains. Is there any difference in principle between the wrongful operation of a locomotive and the wrongful operation of a tricycle? See also in this connection *Smith* v. *Munch,* 68 N. W., 19.

The general rule of liability of the principal to a third party is the same in Louisiana, the scene of this accident or injury, as it is in Mississippi or other common-law states, Louisiana going further than some of them, however, in adhering to and enforcing the doctrine of "last clear chance." *McClanahan* v. *Railway Co.,* 35 South. Rep., 902.

Watson had been entrusted by appellee with the custody and care of a railroad appliance, a tricycle, which, when properly used, was in itself a dangerous instrument, and for that reason defendant cannot escape liability resulting from the improper handling thereof.

Whether or not the tricycle was an appliance of such dangerous character in itself as to require the utmost care in its use, and such care that the railroad could not relieve itself of the responsibility of the improper use thereof, because of its nature, by a servant, nevertheless the limits for the use and keeping of the appliance by the servant had been prescribed, and it was the duty of the servant to return said appliance to its present and proper place for keeping or use, and that, too, no matter

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where he found it or how it got out of place, and in attempting to so return it the servant was doing his duty to his master, and certainly at the implied bidding of his master.

There is no dispute in the testimony as to the character of Watson's employment. He was a pumpman, and to discharge this service for the company he had been supplied with this tricycle. The limit of the right to use the tricycle was to go to and from his home to the tank, and up and down the track generally to pick up kindling with which he could fire his engine. It was his duty to keep this tricycle, property of the company, at Delhi, his home, when not in his actual use for the purposes mentioned.

Now, let us suppose this case: Suppose that on the morning of the 14th of July, 1903, when he started out to do this work, he had not picked up May Barmore (not plaintiff, but the man carried to Waverly) at the pump, but that he had passed him there, and had gone on to the west end of Cow Bayou to get his chips. Suppose that when he got there he had set his tricycle to the side of the track, and that he had walked, or by some other means been conveyed, to Waverly for purposes of his own. Then suppose that May Barmore had followed along behind on his way to Waverly on foot, and had found this tricycle on the side of the track, and had reset it on the track, and had ridden from there on to Waverly on it, and that Watson had been at the station by accident and saw him arrive and had recognized the tricycle as the one in his use and custody. What then would have been his duty to his employer? The answer, and the only correct answer, naturally follows the asking—that is, of course, to carry it back to where it belonged. His duty to his company would arise then and there instantly. Now we submit, in all confidence, that there is no distinction in principle in the case at bar and the supposed case, as to Watson's duty to his master after the tricycle arrived at Waverly, no matter how it got there. As to who did wrong in taking it there, the answer is wholly immaterial. It was Watson's duty to take the

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machine back. This was his business, and although he had left his master's business and had detoured on his own, is it not always implied, is it not always certain, that when an employe does wrong there is no minimum limit as to when he can repent and go back to his duty and the service of his master? He does not have to wait until he can get back to the spot where he first did wrong before he can repent and return to his master's service; if so, he would never get back, unless by chance. As to whether the tricycle was a dangerous appliance, the nature of the piece of machinery must, of course, be considered in connection with the purpose for which it was built. The locomotive is not a dangerous appliance unless it is being used or about to be used for the purposes for which it was built. If it had no steam in it, or if it was not on a railroad track, it would practicably be immovable and of no danger, but give it steam and put it on a track, and unless properly handled it is a very dangerous piece of machinery. So it is with a tricycle, propelled by the muscle of the operator rather than by steam. In both cases the mind of the operator controls the motive power, and unless properly controlled the machine is very dangerous. No distinction can properly be drawn between the inability of the master to escape liability from injuries to a third person arising from the want of proper care, by a servant, of machinery or things dangerous, so called, within themselves, and machinery dangerous only when improperly used. For damages resulting in both instances there is authority for holding the master liable. In the first instance —that is, for things dangerous within themselves—see *Railroad Co.* v. *Shields,* 47 Ohio St., 387 (21 Am. St. Rep., 840). In the second instance, for the improper use of an engine, see *Fitzsimmons* v. *Railroad Co.,* 57 N. W., 127.

McWillie & Thompson, for appellee.

Watson was not serving the railway company in carrying his sick friend to Waverly. So doing was a clear departure from the master's service. Had the plaintiff been injured while

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Watson was on his way to Waverly, he would not, nor would his counsel, contend that the railway company was liable. Is there any difference because of the fact that the injuries complained of were inflicted by Watson on his return trip? If Watson had returned to his master's service and Barmore had been injured by his negligence in the performance of his master's work, the plaintiff would have a cause of action; but this is not true until the servant's return to his master's work is complete. There is a difference between *returned* and *returning.*

It is said by appellant's counsel that Watson owed his master a duty to restore the tricycle, and that he was performing that duty in returning it at the time that plaintiff was injured. This may be true, but it does not follow therefrom that the railway company is liable to plaintiff. Appellant's contention wholly ignores the difference between the performance of a duty by the servant to the master, which springs from the servant's tort, or breach of duty, and one which arises from his employment. In the performance of a duty by the servant to his master arising from his contract of service the servant is performing his master's work; but in the performance of a duty to the master which arises from the servant's own wrong, something not covered by or contemplated in the contract, he is not acting within the scope of his employment. A servant who wrongfully rides his master's horse upon a mission of his own is under the duty to the master to return the horse; this duty, however, does not spring from the contract of service, nor is it contemplated by it, but arises from the servant's wrong. A thief is under a moral and legal duty to restore property stolen by him, but while returning the stolen property he is not the agent or servant of the owner.

Liability of the railway company cannot arise in this case from the fact that Watson was returning the tricycle. If it could, then the railway company would have been liable had Watson been returning by an ordinary dirt road with the tricycle on his shoulder and had injured plaintiff in so doing, or had he been returning the tricycle in a boat and plaintiff had

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been injured by his negligence along the water route. Nothing could be more absurd than the claim that the railway company would have been liable for the acts of Watson while returning the tricycle along the ordinary country road or in a boat; and yet these supposed cases demonstrate that liability in this case cannot be predicated of the fact that Watson, at the time plaintiff's injuries were received, was returning the tricycle to the master's service, and this aside from the fact that his duty to return the tricycle had no relation to his contract of service, but sprang wholly from his unauthorized use of the railway company's property.

Can liability be predicated of the fact that in returning Watson propelled the tricycle along the railroad track?

The real question is, whether Watson, in using the railway track on his return, was performing his master's work. He was on his way to the place where he had abandoned his master's work, but had not *returned* to the master's work. Besides, his returning was but the result of his departure. His returning, like his obligation to restore the tricycle to its proper place, sprang from his departure, and did not grow out of his contract of service and was not contemplated by it.

The fallacy of appellant's argument consists in an assumption which is unwarranted. The argument assumes that the acts of Watson, resulting from and attributable to his independent and individual conduct in departing from the service of his master, are to be treated as having origin in and as springing from his contract for service to the railway company. The use of the railway track by Watson on his return trip was just as unwarranted by and as far removed from his contract of service and his duties to his master thereunder as was its use by him in going to Waverly in order to accommodate his sick friend.

The fact, if it be a fact, that it was Watson's intention while returning to his master's work to pursue that work when his return was completed is of no consequence; he had not *returned* to the work at the time of the accident, and what he intended,

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while returning, to do after his return throws no light on the point in dispute. He was not in the service of his master at the time the intent attributed to him was in his mind nor when plaintiff received his injuries. What he intended to do after he should have returned to the railway's service is wholly unimportant.

Of course, if liability of the railway company does not arise from the fact that Watson, at the time of the accident, was returning the tricycle nor from the fact that he was using the railway track in so doing, there is no liability whatever. The joint effect of the two facts is no greater than the separate effect of the stronger of the two, whichever of the two that may be.

The case of *Canton Cotton Warehouse Company* v. *Pool,* 78 Miss., 147, the last reported decision of this court on the subject, is, we think, absolutely conclusive of this case. In the opinion of the court in that case, delivered by Chief Justice Whitfield, it is said: "The inquiry is not whether the act in question in any case was done, so far as time is concerned, while the servant is engaged in the master's business, nor as to the mode or manner of doing it—whether in doing the act he uses the appliances of the master—but whether from the nature of the act itself, as actually done, it was an act done in the master's business, or wholly disconnected therefrom, by the servant, not as servant, but as an individual on his own account." In that case, so far as time is concerned, the servants of the warehouse company were in its employment at the time of Pool's mishap; were using the master's machinery, and by that use inflicted injuries on Pool. But the acts performed by them were not acts done in the master's business; they were acts done by the employes, not as servants of their master, but as individuals on their own account. Here, so far as time is concerned, Watson might have been an employe of the railroad company at the time plaintiff was injured; he might have been, and in fact was, using the master's tricycle, and in its use inflicted the injury of which complaint is made. But Watson's acts were not performed in his master's

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business; they were performed by him, not as servant of his master, but as an individual on his own account, and grew out of and had their origin in an undisputed departure from his master's work.

In the Pool case the defendant's servants were fully as much under a duty to their master when they perpetrated the practical joke on the plaintiff, and thereby injured him, as Watson was under a duty to the railroad company when returning from Waverly on the tricycle. They were under a duty to see that the master's machinery was not improperly used, a duty which might with a shadow of reason be said to have arisen from their contract of service; and yet this court was not misled by that fact. It was manifest there that the injuries complained of resulted from the servants' bald departure from the scope of their employment, from a misuse, for purposes of their own, of the master's appliances; and the same controlling fact is manifest in this case.

The whole subject-matter of the master's civil responsibility for the wrongful and negligent acts of his servant towards those having no claim upon the master by reason of a contract is so fully treated in the note to 27 L. R. A., beginning on p. 161, that we deem the mere citation thereof sufficient, but will nevertheless call the court's attention to the following cases digested in said note, which we deem most nearly like the one at bar. These cases are:

Chicago, B. & Q. R. R. Co. v. *Epperson,* 27 Ill. App., 79, in which the railroad company was held not to be liable for the acts of its fireman in going into the caboose and getting torpedoes and placing them on the track for the purpose of making a noise to aid in a Fourth of July celebration going on at a station.

New York, T. & M. R. R. Co. v. *Sutherland,* 3; Wilson Civ. Cas. (Tex.), 177, in which the railroad company was held not to be liable for the act of the engineer in running the engine on the main track at night for the purpose of carrying a coffin for

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the accommodation of a third person, when in so doing he was acting without, or contrary to, the master's orders.

Raynor v. *Mitchell,* 2 C. P. Div., 357 (25 Week Rep., 633), in which the servant was held not to have returned to his master's employment so as to render the master liable for injuries caused by his negligent driving. It was the duty of the servant to deliver beer and to bring back empty kegs, and he took the horse and cart for purposes of his own, and after accomplishing his object, he picked up two empty kegs from a customer of his master and took them back with him, and the injuries complained of were inflicted after he took up the kegs.

We also call the court's attention to the following Mississippi cases which we regard as pertinent, and which, it seems to us, demand the affirmance of the judgment from which the appeal is taken:

New Orleans, etc., R. R. Co. v. *Harrison,* 48 Miss., 112; *Burke* v. *Shaw,* 59 Miss., 445; *Fairchild* v. *New Orleans, etc., R. R. Co.,* 60 Miss., 931; *Louisville, etc., R. R. Co.* v. *Douglass,* 69 Miss., 723; *Illinois, etc., R. R. Co.* v. *Latham,* 72 Miss., 32; *Canton Cotton Warehouse Co.* v. *Pool,* 78 Miss., 147.

The following Louisiana cases also demand affirmance: *Garver* v. *Viosca,* 8 Rob., 150; *Dyer* v. *Riley,* 28 La. Ann., 6; *Conniff* v. *Railway Co.,* 42 La. Ann., 477; *Odom* v. *Schmidt,* 52 La. Ann., 2129 (s.c., 28 South. Rep., 350).

Weber v. *Lockman* (Neb.), 60 L. R. A., 313 (a case cited in both briefs for appellant), is much counted upon, but is easily distinguished from the case at bar. There the servant was engaged in the master's business in driving the cattle and in returning the horse. His departure from the direct route home was a thing of the past at the time of the infliction of the injuries for which the suit was brought; he had returned to the direct route before the accident happened. The case would be applicable here if Watson had been doing the railway company's work in carrying the sick man to Waverly and had departed from and returned to the direct route upon his return before

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striking the plaintiff. That is not this case. Watson was upon a personal and individual excursion in going across Cow Bayou and on to Waverly, and had not returned to his master's work when plaintiff was injured.

In *Weber* v. *Lockman,* the duty of returning the horse, as was expressly decided by the court, sprang from the contract of service, and not from the servant's departure from the scope of his duty under that contract.

The cases, cited by opposing counsel, of *Dorsey* v. *Pittsburg, etc., R. R. Co.,* 104 La. Ann., 478 (s.c., 52 L. R. A., 92), and *Williams* v. *Pullman Palace Car Co.,* 40 L. Ann., 87 (s.c., 3 South. Rep., 631), are decidedly favorable to us. In the Dorsey case the injury was inflicted by the brakeman while ejecting a tramp from the train—a duty, as decided by the court, clearly within the scope of his employment. The Williams case was a suit for an assault and battery committed by a Pullman porter upon a railroad passenger who was not a sleeping car passenger. The railroad company was held liable, because as carrier it owed the plaintiff the duty of safe carriage, and the porter was adjudged to be a servant of the railroad company as well as of the sleeping car company. The Pullman company was acquitted from liability because the assault was not committed within the scope of the servant's employment by that company, and that, too, although he was, so far as concerns time, in the employment of the Pullman company when the assault was committed, and was in one of its cars, and perhaps used an implement belonging to the company as a weapon with which to strike plaintiff. We have no complaint to make of the case of *Cosgrove* v. *Ogden,* 49 N. Y., 225 (s.c., 10 Am. St. Rep., 361), cited by counsel, nor with the decision in *Fitzsimmons* v. *Milwaukee, etc., R. R. Co.,* 57 N. W. Rep., 127. The case last cited is not parallel to the case at bar. Had the engineer in that case run his engine upon some other railroad or upon some track that it was never intended to be run upon, there might be some similarity to the present case. There the engine was de-

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signed to be run on the track where the injury happened, and it was nothing more than the case of a servant disobeying orders while in the service of his master. The engineer there did not quit the service; here Watson had departed from his master's service. Besides, that case was one in which the railroad company was clearly liable outside of the question of violating orders and departing from service.

Custody of Dangerous Instruments.—This brings us to the question of the custody of the tricycle, which appellant's counsel have undertaken to magnify into a dangerous instrument and seek to hold the railway company liable for everything done by Watson with the tricycle because of its dangerous character. This court said in the Pool case, "The ordinary appliances in use in an ice factory cannot be so classed, certainly not a coal scoop and electric lights," meaning that such appliances cannot be classed with such dangerous implements as steam engines, dynamite, torpedoes, etc. Of course a railroad tricycle cannot be so classed. Such tricycles are no more dangerous than hammers, clubs, axes, hatchets, etc.

If the court takes judicial notice of what railroad tricycles are, it knows they are not dangerous; certainly all of them are not. If the court does not take such notice, then the judgment of the lower court should be affirmed, since the judge as well as the jury actually inspected the tricycle in question as a part of the evidence in the case, and the same is not brought to this court.

The judgment appealed from, although predicated of a peremptory instruction, is presumed correct. Unless, therefore, this court judicially knows that all railway tricycles are so inherently dangerous that the owners of them are responsible for the acts of all persons to whom their custody may have been intrusted, the judgment appealed from must be affirmed. The judge below, who had the tricycle before him, adjudged that the particular tricycle was not dangerous. How can this court say it was dangerous in the absence of the evidence, or any part of

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it, upon which the court below acted? The court below adjudged from an inspection of the particular tricycle that it was so far from being a dangerous implement that a verdict could not be maintained predicated of the finding that it was dangerous. Can this court, without the evidence before it on which the judgment was based, say that such judgment was erroneous? Most certainly not.

Vicious animals, poisons, and dangerous premises, including in such premises railroad turn-tables and other structures which are alluring to children, not being under consideration, we propound the following proposition and definition: A dangerous implement within the meaning of the law is a contrivance which, through the employment of dangerous agencies, such as steam, electricity, dynamite, gunpowder, and the like, frequently passes, or is likely to pass, beyond human control. Such contrivances are easily distinguishable from those operated by the hand or foot of man, and which are certainly subject to his control, except under an unusual combination of circumstances.

Argued orally by *R. L. McLaurin,* for appellant, and by *R. H. Thompson,* for appellee.

TRULY, J., delivered the opinion of the court, the majority opinion.

Considering the time, place, and circumstances under which the injury forming the basis of this suit was inflicted, we think the question of whether Watson, the employe of appellee, to whose negligence the injury is charged, was on that occasion acting outside the scope of his employment, should have been submitted to the consideration of the jury. The record demonstrates that the relation of master and servant existed between Watson and appellee, and, this being established, the question of whether, in the particular instance, the servant was acting within the scope of his employment, if there is no conflict in the facts, is a question of law for the court. If there is con-

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flict, it is a question of fact to be submitted to the jury. *Brewing & Malt. Co.* v. *Huggins,* 96 Ill. App., 147; *Krzikowsky* v. *Sperring,* 107 Ill. App., 493; *Railroad Co.* v. *Latham,* 72 Miss., 36 (16 South. Rep., 757). And in order to escape liability it devolves upon the master to prove that the servant had abandoned the duties of his employment, and gone about some purpose of the servant's own, in which the master's business was not concerned, and which was not incident to the employment for which the servant was hired. If the testimony leaves this question in doubt, it must be submitted to the jury. *Ritchie* v. *Waller,* 63 Conn., 157 (28 Atl., 29; 27 L. R. A., 161; 38 Am. St. Rep., 361, and citations).

In the case at bar it was the servant's duty to attend to the steam pump located on appellee's line of railroad, and used in supplying water to locomotives of passing trains, and have it ready for operation whenever needed for this purpose. In connection with, and as a part of, this employment, it was the servant's duty to provide the fuel consumed in generating the steam needed for the operation of the pump. But the manner, time, and place of gathering this fuel were submitted to his judgment without express directions from appellee. The servant was required to see that the needed fuel was provided, but the details of its gathering were left to the dictation of his pleasure and convenience. For his use in going to and from the pumping station, and for transporting fuel and kindling which he would gather along the right of way, Watson was intrusted with the custody and power to use an engine or machine known in the record as a "railroad tricycle." Upon this, in quest of fuel, he had the right to ride over the track of appellee's line of railway, without let or hindrance, any distance and in any direction. On the morning in question, in the discharge of his duty, he took the tricycle and proceeded to the place where his duty called him—where the pump which he was to operate was situated. Finding that it was necessary to procure fuel, he went further down the track in search of kindling or

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firewood, with the intention of proceeding to a trestle, where certain bridge work had recently been done, with the hope of procuring the necessary fuel at that place. Before reaching this place, and without discharging the duty which was incumbent upon him, for purposes of his own he went by the place which he had chosen as the one where he would gather his fuel, and proceeded with his tricycle to a station some miles distant. Having completed this errand—undertaken, admittedly, for his own pleasure—he again started with the tricycle to retrace his course to the spot where his duty to his master called him; but before reaching this place, he negligently ran the tricycle against and seriously injured the appellant, who was walking across a trestle and could not avoid the collision. It is contended that, inasmuch as Watson had passed by the spot where he should have gathered the fuel, this was a departure from his duty to his master, and that the master was not liable for his acts, or for any injury which he might inflict, until he had actually returned to the spot where the fuel was.

We recognize the well-established exception to the general rule by which the master is excused from liability for the tortious act of the servant when committed outside the scope of the servant's employment. That exception governs in all cases when the servant abandons his master's service and engages in some purpose personal to himself. The principle is free of difficulty, and is adhered to in all proper cases, but it has no application to the facts in the instant case. Watson was no mere sentient tool, with no power to exercise judgment or discretion as to the time or manner in which his duties should be performed. He was intrusted with the performance of a certain duty, but the details of his service were not regulated or prescribed by the instructions of any superior, but left solely to his own uncontrolled judgment. For the acts of such servants the master is responsible unless it clearly appears that the wrongful acts were beyond and outside the scope of their employment and committed in the furtherance of their own per-

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sonal ends. "The master is responsible for the negligent acts or omissions of his servants in the course of their employment, though unauthorized or even forbidden by him, and although outside of their 'line of duty,' and without regard to their motives." 1 Shear. & Red., Negligence, sec. 146. And the master cannot escape liability, even though the acts of the servants were "unauthorized, willful, and wrongful." *Id.*, sec. 150; 1 Thompson, Negligence, secs. 518, 519. And this is the recognized rule in this state, even though the party injured is a trespasser on train or track. *Railroad Co.* v. *Harris,* 71 Miss., 76 (14 South. Rep., 263); *Richberger* v. *Express Co.,* 73 Miss., 161 (18 South. Rep., 922; 31 L. R. A., 390; 55 Am. St. Rep., 522).

In determining whether a particular act is committed by a servant within the scope of his employment, the decisive question is not whether the servant was acting in accordance with the instructions of the master, but, Was he at the time doing any act in furtherance of his master's business? If a servant, having completed his duty to his master, then proceeds to prosecute some private purpose of his own, the master is not liable; but if the servant, while engaged about his master's business, merely deviates from the direct line of duty to accomplish some personal end, the master's responsibility may be suspended, but it is reëstablished when the servant resumes his duty. Even if in violation of express orders, a deviation from is not an abandonment of the master's service. *Mulvehill* v. *Bates,* 31 Minn., 366 (17 N. W., 959; 47 Am. St. Rep., 796); *Rahn* v. *Singer Mfg. Co.* (C. C.), 26 Fed. Rep., 912; *Weber* v. *Lockman* (Neb.), 92 N. W., 591 (60 L. R. A., 313); *Sleath* v. *Wilson,* 9 Carr. & Payne, 607; *Ritchie* v. *Waller, supra; Williams* v. *Hochler,* 41 App. Div., 426 (58 N. Y. Supp., 863); *Quinn* v. *Power,* 87 N. Y., 535 (41 Am. St. Rep., 392).

If the act which the servant was engaged in at the time of the injury was one which, if continued until its completion, would have furthered the master's business and been within

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the scope of the servant's employment, the master would be liable, even though the act occurred at a place to which his duty did not necessarily call him. *Geraty* v. *Nat. Ice Co.,* 16 App. Div., 174 (44 N. Y. Supp., 659). This class of cases is plainly distinguishable from those in which there has been a departure —a turning aside—from the master's business to engage in an affair not incidental to his service, but purely of the servant's own. The principle of law governing each class is well understood, the main difficulty being the classification of the particular case.

In the instant case it was the duty of Watson to procure fuel. He was given control and custody of an appliance to be used for that purpose and in going to and from his work. On the occasion in question he went by the place where his duty called him, on an affair in no wise connected with the master's business or his own service. That moment he deviated from his duty and from the scope of his employment. It must be noted that the service of the day in which the servant was then engaged—the gathering of the fuel and operating of the pump—had not been discharged when Watson deviated from his service. But the testimony of the servant himself shows that he had not abandoned his duty. He still intended to gather the fuel on his return from his own errand, and to regain his post of duty at the pump. It is conceded by counsel for appellant, so far as the discussion of this particular phase of the case is concerned, that, for any injuries which Watson might have inflicted between the time when he deviated from his service and when he resumed it, the master was not responsible. We express no opinion of this point; but, even if it be true, the inquiry arises; When did Watson resume his service, so as to render his master liable? His private affair was to carry a sick friend to the station, but when that was completed and he began to propel the railroad tricycle back over the route which he had previously traveled, with the intention and for the purpose of proceeding to the discharge of the duty which he was employed to perform,

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he then resumed his master's service, which had been suspended temporarily while he was engaged about his own affairs. The argument that Watson did not resume his duty until he actually reached the spot where he was to gather the fuel rests on no solid legal foundation. He was operating the appliance which it was his duty to operate. He was on the track at a place which he was compelled to pass over, and proceeding to the place where his duty called, for the purpose of performing that duty, and was at the time of the injury engaged about no affair of his own, but discharging in the usual and customary manner the business for which he was employed. Under such circumstances the master is answerable for the tort of the servant.

We hold, in cases where the servant has made a temporary departure from the service of the master, that when the object of that departure has been accomplished and the servant reengages in the discharge of his duty, the responsibility of the master instantly attaches. Any other conclusion would leave us without any definite rule, in cases of temporary abandonment of duty, to determine when the servant reëntered the scope of his employment. This conclusion is not antagonistic to any express decision in this state or in Louisiana, where the injury happened. Speaking of the doctrine of the responsibility of the master for the torts of the servant, the supreme court of the latter state has said: "The law is simple. Masters and employers are answerable for the damage occasioned by their servants and overseers in the exercise of the functions in which they are employed. Rev. Civ. Code, art. 2320." *Odom* v. *Schmidt,* 52 La. Ann., 2129 (28 South. Rep., 350).

In this state the exact question here presented has never been passed on. The cases cited by appellee are all based on the fact that the act complained of was one clearly beyond the scope of the servant's employment. The final test to determine the master's liability is thus stated in the case of *Canton Co.* v. *Pool,* 78 Miss., 157 (28 South. Rep., 824; 84 Am. St. Rep., 620): "Whether, from the nature of the act itself, as actually done,

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it was an act done in the business, or wholly disconnected therefrom, by the servant, not as servant, but as individual, on his own account." The facts of the case at bar demonstrate that the act here complained of was done at a time while the servant was engaged in the master's business, by the use of the master's appliances, used in the way they were intended to be, and was wholly disconnected from any personal enterprise of the servant.

The conclusion we have reached is supported by authority elsewhere. Thus in *Chi. Con. Bottling Co.* v. *McGinnis,* 86 Ill. App., 38, the master was held liable for injuries inflicted by the driver of his wagon, though the driver had temporarily departed from his employer's service, and had deviated from the direct route over which his duty required him to pass, on an enterprise purely personal to himself—namely, to call on his wife—and the accident occurred after the completion of this personal mission, at a time when the servant had again assumed control of his master's vehicle, but before he had actually again performed any act in the master's service. Says the court: "It is contended, first, that when a servant, acting as driver of his master's wagon, leaves the direct route of his business and goes upon some errand of his own, the master cannot be held to respond for negligence of the servant while upon such errand." And after discussing the other questions presented and stating the general rule governing the master's liability as we have herein announced it, the court responds to the contention, saying: "We are of the opinion that, applying the rules to the facts of this case, it cannot be held that the driver of the appellant, when he again started on his business of delivering goods of appellant, after having stopped upon an errand of his own, was not engaged in the master's work, within the scope of his employment." So, in *M., K. & T. Ry. Co. of Texas* v. *Edwards* (Tex. Civ. App.), 67 S. W., 891, the facts were: A brakeman on the train of the appellant abandoned the master's service on the train which he was assisting in operating, crossed the track on the opposite side of the train, and went on an errand of his

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own into a near-by saloon, and, having completed that errand, injured the plaintiff on his way back to regain the post of duty. One of the issues was: "If said brakeman did cause said injuries, whether he was then in the discharge of his duties as such brakeman." The court, on that state of facts, presenting the same legal question as the case before us, deciding the question in the affirmative, said: "Whether or not the brakeman was in the discharge of his duties when he knocked appellee under the train was more a question of law than one of fact. His place of duty was on the opposite side of the train, but the evidence of appellee tended to show that he had gone to a saloon or restaurant on the side of the train where the accident occurred, and was hurriedly returning to board the train, then just moving away, when he ran against appellee. While he may not have been on his master's business in stepping aside to the saloon or restaurant, we think it must be held that he was when he ran over appellee in the effort to resume his accustomed place of service." And as bearing upon another phase of Watson's duty to the appellee—that of safely caring for and returning the appliances of the master used in the dispatch of his business—see *Pitts., St. L. & Cin. Ry. Co.* v. *Kirk,* 102 Ind., 404 (1 N. E., 849; 52 Am. St. Rep., 675). In that case a section foreman was returning with his crew, car, and tools over the track of the master, and, finding a car on the track between him and the place where it was his duty to return the car and crew, he, without authority, removed the car from his master's track and placed it on the track of another railroad company, thereby causing an accident, and the master was held liable. Treating of the actions of the servant in this regard, the court observed: "In all this, whatever his motive was, he was pursuing the master's service—that of returning the car, tools, and crew to their appointed place, as was his custom and duty; and while he pursued the service in an unauthorized and possibly forbidden way, he and those with him were during the time in the relation of servants to the appellee. Concede that in going

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off the employer's line he pursued a course which was beyond his authority; his purpose in doing so was nevertheless to accomplish an end within his employment, and reasonably, as he supposed, fitted to reach that end." See also *E. St. L., etc., Ry. Co.* v. *Reames,* 173 Ill., 586 (51 N. E., 68); note to *Ritchie* v. *Waller,* 27 L. R. A., 161; *Whitman* v. *Pearson,* 37 L. J. C. P., 156.

Under the facts of this case it was error in the court to charge, as a matter of law, that Watson was not acting within the scope of his employment when the injury was inflicted on appellant.

There is another theory developed by this record, which the appellant was entitled to have submitted to the consideration of the jury. It grows out of the well-established principle of law that a master who intrusts the custody and control of a dangerous appliance or agency to the management of a servant will not be permitted to avoid responsibility for injuries inflicted thereby on the plea that the servant, in the particular act complained of, was acting outside the scope of his employment. As stated in another connection in this opinion, we adhere to the general rule which exonerates the master from liability for the acts of the servant committed beyond the scope of his employment; but this rule is not of universal application (being itself but an exception to the general rule which primarily imputes liability to the master), nor is it antagonistic to the position here assumed. The servant is empowered by the master to discharge certain duties, and it is incumbent upon him to exercise the same care and attention which the law requires of the master; and if that care and attention be about the management and custody of dangerous appliances, the master cannot shift the responsibility connected with the custody of such instruments to the servant to whom they have been intrusted and escape liability therefor. This rule arises from the absolute duty which is owing to the public by those who employ in their business dangerous agencies or appliances, en-

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gines or instruments—liable, if negligently managed, to result in great damage to others. The true rule, and the one supported by reason and authority, is thus stated in *P., C. & St. L. R. Co.* v. *Shields,* 47 Ohio St., 387 (24 N. E., 658; 8 L. R. A., 464; 21 Am. St. Rep., 840): "If the master intrusts the custody of dangerous agencies to his servants, the proper custody as well as the use of them becomes a part of the servant's employment by the master, and his negligence in any regard is imputed to the master in an action by one injured thereby. And where the injury results from the negligence of the servant in the custody of the instrument, it is immaterial, so far as the liability of the master is concerned, as to what use may have been made of it by the servant." In such cases the duty of the servant is to carefully guard and control such instrument, and a failure in this respect is not a departure from the master's service, but a negligent discharge of that service. This distinction is plainly marked. As said in the Shields case, *supra:* "A servant may depart from his employment without making his master liable for his negligence when outside the employment of the master, and he so departs whenever he goes beyond the scope of his employment and engages in affairs of his own. But he cannot depart from the duty intrusted to him, when that duty regards the rights of others in respect to the employment of dangerous instruments by the master in the prosecution of his business, without making the master liable for the consequences; for the first step in that direction is a breach of the duty intrusted to him by the master, and his negligence in this regard becomes at once the negligence of the master." This rule applies in all cases where agencies liable to be the means of inflicting serious injury upon others are placed in the custody of servants. The rule is designed for the protection of the public. As the master, if personally in control of the agency or appliance, would be liable for all injuries inflicted by its mismanagement or misuse, so he is not permitted to delegate the performance of the absolute duty of

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care which is imposed on him in its custody and control so as to shift the responsibility for a failure to discharge it. *Birmingham W. W. Co.* v. *Hubbard,* 85 Ala., 179 (4 South Rep., 607; 7 Am. St. Rep., 35); *Tex. & Pac. R. Co.* v. *Scoville,* 62 Fed. Rep., 730 (10 C. C. A., 479; 27 L. R. A., 179; 27 L. R. A., 200, note); 1 Thompson, Com. on Neg., secs. 523–533; *Euting* v. *Chi. & N. W. Ry. Co.,* 92 N. W., 358 (60 L. R. A., 158; 96 Am. St. Rep., 936); *Regan* v. *Reed,* 96 Ill. App., 462; *Alsever* v. *Minn. & St. L. Ry. Co.,* 115 Iowa, 338 (88 N. W., 841; 56 L. R. A., 748). The case last cited was one where the servant into whose hands the master had committed the custody of an appliance to be used in its service allowed the steam or spray to escape so that a child standing by became frightened, fell, and was injured. The plaintiff sought to prove that the steam or spray was blown off with the deliberate design of frightening the children. The railway company defended on the ground that the escape of steam was incident to the operation of the engine, and was so used on the occasion in question. But the master was held liable; the court, after a full discussion of the question, in which numerous authorities are cited and analyzed, stating its conclusion as follows: "The company had placed in his charge an instrumentality requiring care in its operation and management. He was doing precisely what the company contemplated he should do when it employed him —*i. e.,* operating the blow-off cock. When this was to be done, and how, as said, was left to his discretion, the use of which was also contemplated in his employment; and the company was as responsible for a mistake or willful perversion of judgment in its operation, if within the compass of what he was to do, when amounting to negligence, as for his negligence in doing that which may be conceded to have been necessary."

The absolute duty of the master, which cannot be delegated, in reference to the degree of care demanded in the custody, control, and operation of dangerous instrumentalities, applies not to those alone which are operated or propelled by the power

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of steam, electricity, powder, dynamite, or kindred forces, but to all instrumentalities employed by the master which, by reason of the method of their operation, are capable of, and liable to, inflict serious injury to others. The motive power is not the sole consideration in determining whether an instrumentality falls within the general classification of "dangerous agencies and appliances."

An attempt has been made, in a very few illogically reasoned cases, to draw a distinction between instrumentalities "dangerous in themselves" and those "dangerous by reason of improper use," and confine the master's liability to cases due to mismanagement of the former class alone. An analysis will show that the distinction is more imaginary than real, and too refined to be of any practical benefit as a method of determining legal responsibility. The argument has a degree of plausibility when limited to agencies inherently dangerous even when most carefully handled, such as dynamite and similar substances, as distinguished from those of like character, such as gasoline, naphtha, and the like—only dangerous when proper precautions are not observed; but the sophistry of the argument becomes apparent, and refutes itself, when we come to the consideration of dangerous engines, machinery, or appliances. No appliance is "dangerous of itself," but practically every appliance may become "dangerous by improper use." Neither a locomotive, pile driver, electric or cable car, automobile, threshing machine, or team and wagon is "dangerous of itself," yet with practical unanimity the courts hold the master liable for damages caused thereby, even though the servant who has the sole custody and control thereof is at the time acting willfully, wantonly, and in disobedience to his master's orders. And so, on the other hand, an ax, a crowbar, a scythe, and similar implements in daily use, are equally as deadly when improperly used; but no court would hold a master liable for the tortious act of his servant on the ground alone that he had intrusted the custody of such appliance to the servant. No appliance when at rest is

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"dangerous in itself." It is by operation alone that it becomes capable of causing injury. So, in our opinion, a better test, though probably not itself without exceptions, of the master's liability, would be whether the agency or appliance, the custody and control of which he committed to his servant's judgment and discretion, was "dangerous in itself," or liable to inflict serious injury to others, when operated in the customary method of use and while being devoted to the purposes for which it was designed. If so, the public safety demands that he shall be answerable for the exercise of his servant's judgment. We are not without eminent authority for this position: "Whenever a master sends his servant out beyond his own eye and immediate control, in the custody of any species of property of the master which, unless properly cared for, guarded, and used, is liable to work injury to third persons, it is necessarily a part of the duty which the master commits to the servant so to care for, guard, and use such property as that it shall not work such injury." 1 Thompson, Com. on Neg., sec. 589; *V. & J. R. Co.* v. *Patton,* 31 Miss., 156 (66 Am. Dec., 552); *N. & C. R. Co.* v. *Starnes,* 9 Heisk., 52 (24 Am. St. Rep., 296); *Phil. Ry. Co.* v. *Derby,* 14 How. (U. S.), 468 (14 L. ed., 502); *Erie Ry. Co.* v. *Salisbury* (N. J. Err. & App.), 50 Atl., 117 (55 L. R. A., 578). And the soundness of this proposition is plainly recognized by this court in *Canton Co.* v. *Pool, supra.* Though its application to the facts of that case was correctly denied, it being there said that the case there presented was "not like cases when the question is as to the custody of dangerous implements, as steam engines, dynamite, torpedoes, etc., thus expressly recognizing that the same rule controls whether the injury be caused by an agency 'inherently dangerous' or by an 'implement' which only becomes dangerous by reason of misuse." In *Erie Ry. Co.* v. *Salisbury, supra,* the master was held responsible for the acts of the servant for injuries inflicted by a "push car" which had been placed in the custody of the servant, although at the time of the injury the car was not

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being used in the service of the railroad, but in the business of a third person to whom the servant had loaned the car. The court says: "When the company placed the push car in the hands of the foreman, it was the duty of the foreman to use it with reasonable care to prevent injury to any one lawfully on the tracks and to keep it under his own supervision until it was returned to the company. For the performance of that duty by the foreman the company was bound, and the failure of the foreman to perform it was the failure of the company. The company cannot claim immunity on the ground that its servant violated the instructions given to him, any more than it could set up in defense that an engineer had violated the express instructions given to him to ring the bell at a public crossing." And the decision in the case is grounded upon the true basic principle: "The obligation to see that the duty is performed is cast upon the owner of the road. The safety of the public demands that the company shall be strictly held to its performance."

It is, of course, impracticable, if not impossible, to state any general definition by which it may be decided with any degree of certainty what appliances or agencies do, and what do not, fall within the term "dangerous," as employed by courts and text writers. The limit of human inventive genius has not yet been reached, and appliances are as variant as the uses to which they are devoted. And, again, something must depend on the circumstances attendant upon the use of the particular instrumentality in question. But we see no reason, justice, or legal principle in the distinction which would allow compensation for an injury inflicted by the misuse of a locomotive, electric car, or horse and wagon, and yet deny recovery, though the injury is to the same extent, and inflicted under similar circumstances, when caused by the mismanagement of a hand car or railroad tricycle. While the propelling power differs in each instance cited, all are subject to human control, and all

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are alike liable to cause serious injuries to others, and this is the real reason on which the liability of the owner is founded.

The views we have herein announced, and the principle on which the liability of the master is based, are clearly recognized by the supreme court of the United States in *Railroad Co.* v. *Derby, supra.* In summing up the whole matter, the court says: "The intrusting such a powerful and dangerous engine as a locomotive to one who will not submit to control is itself an act of negligence—the '*causa causans*' of the mischief—while the proximate cause, or the *ipsa negligentia* which produces it, may truly be said in most cases to be disobedience of orders by the servant so intrusted. If such disobedience could be set up by a railroad company as a defense, when charged with negligence, the remedy of the injured party in most cases would be illusive, discipline would be relaxed, and the danger to the life and limb of the traveler greatly enhanced. Any relaxation of the stringent policy and principles of the law affecting such cases would be highly detrimental to the public safety. And these expressions apply with more striking force to the condition of affairs which would exist if railroad companies who intrust dangerous appliances to an untrustworthy servant were permitted to say that at the time of any alleged injury such servant was not acting within the scope of his employment. If this be the law, the recovery of all persons injured by the misuse of such appliances is largely dependent upon the veracity of the employe by whose negligence the injury is caused.

In the case at bar it is contended by the appellee that inasmuch as the tricycle, by the running of which the injury was inflicted, was before the trial court, and by the trial judge examined and pronounced not to be a dangerous appliance, we should on this account accept this finding of fact by the trial judge as conclusive, and not disturb the judgment. The decision of facts is not within the province of the judge. Whether or not the railroad tricycle, as propelled, and moving at the rate

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of speed testified to, when it struck appellant, was a dangerous instrumentality, liable to cause serious injury, should have been submitted to the jury for decision in the light of the testimony and their personal examination of the tricycle in question.

It is not necessary, as the record is here presented, for us to discuss or decide the exact legal status of appellant at the time or the exact duty which appellee owed to appellant under the circumstances attending the injury, for the reason that a peremptory instruction was granted appellee, and appellant is entitled to have the testimony in his behalf accepted and considered as true. So treating it, the record shows that appellant was injured by the gross negligence of the employe of appellee, who, knowing appellant's perilous situation, wantonly caused the injuries complained of. If this be true, contributory negligence would constitute no defense, and appellant, even though a trespasser, would nevertheless be entitled to recover.

Reversed and remanded.

WHITFIELD, C. J., delivered the following dissenting opinion:

The facts in this case are briefly these: The plaintiff, a farmer, living in the country, several miles from defendant's line of railway, rode his horse from his farmhouse to the railway track, at a point between stations, hitched the animal near the track, and started on foot along the railway track, going westward to a town called "Delhi," over three miles distant from the place where plaintiff left his horse. One Watson was employed by the appellee railway company to pump water at a water station, a point on the west side of a stream called "Bayou Macon," distant about a mile east of Delhi, and he was furnished with a railroad tricycle, with which to carry himself from his home, at Delhi, to the pumping station; and he was also permitted to use the tricycle in gathering up chips with which to start the fire in the machinery which ran the pump. On the date of the accident resulting in plaintiff's injuries, Watson left home in the morning, riding his tricycle, went to the

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pumping station, and finding there, on dismounting, no chips with which to start a fire in the machinery, he again mounted the tricycle and rode eastward to a point on the western side of Cow Bayou, where the appellee's bridge crew had shortly before been at work and had left a goodly quantity of splinters, chips, etc. Just as he reached this place on the west side of Cow Bayou, where the splinters and chips lay by the side of the track, an acquaintance (a Mr. Barmore, son of the plaintiff) put in his appearance. I understand the record as showing this to be the fact. This Mr. Barmore informed Watson that he was ill, and desired to be carried on the tricycle from the western side of Cow Bayou, where the parties then were, to a town or station on the railway called "Waverly," some three miles to the east. Watson took young Barmore on his tricycle and carried him to Waverly. After this, Watson rode on his tricycle westward from Waverly toward Delhi. On this return trip, and before he reached Cow Bayou—a stream which is crossed on a trestle 1,600 feet in length—Watson came in sight of the plaintiff as he was walking on the track, on his way from where he had left his horse to Delhi, and ran the tricycle carelessly and negligently against the plaintiff, and caused the injuries for which the suit is brought. It will be noticed that Watson had not, when the plaintiff was overtaken and struck, returned as far west as the point where the chips lay, and had not completed the excursion to and return from Waverly, made on his own responsibility. The court and the jury during the trial inspected the tricycle.

The true test as to whether an act is done by the servant within the scope of the master's business has been thrice recently stated with great care by this court. Those cases are: *Railroad Co.* v. *Latham,* 72 Miss., 32 (16 South. Rep., 757); *Richberger* v. *Express Co.,* 73 Miss., 161 (18 South. Rep., 922; 31 L. R. A., 390; 55 Am. St. Rep., 522); *Canton Cotton Warehouse Co.* v. *Pool,* 78 Miss., 147 (28 South. Rep., 823; 84 Am. St. Rep., 823). This last case seems to me conclusive

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of the one at bar. In the Latham and Pool cases we quoted with our emphatic approval the statement of this doctrine laid down by that great judge, Chief Justice Andrews, of New York, in *Rounds* v. *Delaware R. Co.,* 64 N. Y., 136 (21 Am. St. Rep., 597), which opinion is declared by Finch, J., in *Quinn* v. *Power,* 87 N. Y., 537 (41 Am. St. Rep., 392)—one of the cases cited by the majority of the court—to contain as "accurate an announcement of the doctrine on this subject as it is possible to make." The doctrine, therefore, on this subject needs no restatement, nor do I understand my brethren to differ in the least from the doctrine announced in the three cases from our own court above referred to. The difference between us results from a difference of view as to whether the servant in this case simply deviated from his master's business in doing the act which resulted in the injury or wholly departed from his master's business in doing said act. To my mind, nothing could be clearer than that Watson, the servant of appellee, employed to pump water at a watering station, never was in his master's service from the time he left the place on the west side of Cow Bayou, where the splinters and chips lay, until he returned to that identical point. His precise business was to pump water. Incidental to the performance of this duty, he was permitted to gather up chips and splinters along the track, with which to carry on his work. So, up to the time that he reached the place where the chips and splinters lay, he was doing his master's business. It was no part of his service to his master to take a sick man (young Barmore, plaintiff's son) three miles east of the point where the chips lay, clear away from the scene of his duty. This was purely an excursion of his own, totally distinct from his master's business. He did it out of good motives, doubtless—to aid the sick man—but in doing it he totally departed from the service of his master from the time he left the place where the chips lay until he got back to that place. Neither in going from that place to take the sick man three miles to Waverly, nor in returning, was he, in any proper legal

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sense, for one moment engaged in the service of his master. If so, he could just as logically be held to have been engaged in his master's service if he had taken the sick man on his tricycle to Jackson or Meridian; and yet I apprehend that my brethren would hardly hold that if he had taken this sick man to Jackson or Meridian, and inflicted this injury on appellant on the trestle on the return trip, the railroad would be liable. Surely no such stretch of the doctrine as that would be approved by my brethren. The error into which the majority of the court has fallen, as I humbly conceive, is in confusing deviation from the master's service with a total departure therefrom; and this, I think, can be easily demonstrated by a review of the authorities cited in the opinion of the majority to support their conclusion. Let us now take up each of these authorities and see what the exact facts were in them. I will examine each case in the order in which it is cited:

In the case of *Mulvehill* v. *Bates,* 31 Minn., 364 (17 N. W., 959; 47 Am. St. Rep., 796), the servant drove an express wagon regularly for the master, picking up business on the streets. On the day in question he had gone over to West St. Paul to deliver a trunk; then he went a block and a half in a direction away from his return route to St. Paul, and got a load of poles for himself, and was taking the poles home when he ran over the boy. The court say: "We understand from this that the horse and express wagon were intrusted generally to the driver, with authority to secure such business as he could, make his own contracts, and drive wherever it might be necessary to go in order either to receive or deliver any articles which he might be employed to transport. Had some one employed him to transport a load of poles, it seems to us that there would have been no doubt but that in going for them, and in conveying them to their destination, he would have been acting within the scope of his employment, for that was just the kind of business he was employed to perform, as much as transporting trunks or any other kind of property. . . . He was intrusted generally with

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the wagon, to hunt up just such work wherever he could find it, and with authoritv to carry articles for whomsoever he saw fit." And, again, the court say, distinguishing a previous case: "But here the wagon was intrusted generally to the driver, to be used entirely at his discretion. It is true that in that case (the one distinguished), but for a statute, the relation between the owner of the cab and the driver would have been that of a bailor and bailee, and not of master and servant. The statute created the relation of master and servant—a relation which in the present case confessedly existed. But as is expressly stated in the case referred to, it was only with regard to the employment of the cab, within the scope of the bailment, that the relation of master and servant was created. Hence there, as here, it had to be determined whether at the time of the injury the vehicle was being used within the scope of the bailment or employment; for, as it is there said, if the employment of the vehicle by the driver at the time the mischief was done was wrongful, in the sense that it was beyond the scope of the bailment, then the master would not be liable. So, in this case, if the driver had taken the wagon on an independent journey of his own, altogether out of the scope of the purpose for which it was intrusted to him, and an injury had then occurred, the defendant would probably not have been liable." So that decision clearly was, as shown by the syllabus, part of which is underscored, based on these facts: "The owner of an express wagon employed a servant to drive it, and intrusted it to him *generally,* to be used, at his discretion, in doing such business as he (the *servant*) *could secure in the way of employment for the wagon."* The precise opposite is true here. This tricycle was not intrusted to the servant to be employed by him generally, in his discretion, but to do this specific thing of going to the pumping house and for gathering up chips. Surely what he did here was not in pursuance of this authority, but was just what the court called "an independent journey of his own." In other words, this express driver of the master's wagon, when he set

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out for West St. Paul, carried a trunk to be delivered. Let it be specially noted that he was, in delivering this trunk on the outgoing trip, precisely engaged in the master's service, and, furthermore, that, under the general discretionary authority given him, he had authority to carry these very poles as well as trunks. It is plainly a case, so far as the carrying of the poles is concerned, of acting within the general authority given him. Here the servant, when he set out with Barmore for Waverly, was doing nothing for the master. He had no authority to carry sick people to distant places from the scene of his work. The case differs in two most vital particulars from the case at bar: First, that when he set out he was doing nothing for his master; second, that the tricycle was in no sense intrusted to be used generally, in his discretion, for any purpose he saw fit.

In the case of *Rahn* v. *Singer Mfg. Co.* (C. C.), 26 Fed. Rep., 912, Corbitt, the servant of the Singer Manufacturing Company, ran over the plaintiff in Franklin avenue, in the city of Minneapolis, at the time he had a Singer sewing machine in the wagon, which he was to sell upon commission, and was then engaged in trying to sell it. The case shows that Corbitt was employed to canvass and to sell such machines on terms to suit his own convenience, and had taken that trip to look after his own private business, but at the same time was pursuing the defendant's business; and the court expressly held that the company would be liable if Corbitt thus "combined his own business with that of the defendant, and was using the team not exclusively for his own ends, but at the same time was pursuing the defendant's business." And the court added: "If Corbitt had been attending to his own business, and was returning home from a private business trip or a pleasure trip of his own, and was engaged in business outside of the range of his employment by the defendant, at the time the plaintiff was run over, then, although he was using the wagon at the time which he used when engaged in the performance of the defend-

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ant's business, the defendant was not liable. Corbitt must be shown to have been, at the time the plaintiff was run down, engaged in the business of the defendant." Here, also, specially note, Corbitt at the time of this injury had the Singer sewing machine on his wagon; was canvassing to sell it; had set out upon and was pursuing the master's business. There is not, in my view, the faintest resemblance between this case and the case at bar.

In the case of *Weber* v. *Lockman* (Neb.), 92 N. W., 591 (60 L. R. A., 313), Weber, Sr., had a farm and a herd of cattle. As a part of his business, the cattle had to be driven five or six miles from home and put in a pasture. His son proposed one Sunday morning to drive the cattle to pasture. Weber, Sr., objected because it was Sunday. The son, without the father's knowledge, drove the cattle to pasture, and then made a detour in returning, about a mile, to visit some friends. On coming back home, after nightfall, the horse became frightened, ran away, and injured the plaintiff. The court said that the business of driving the cattle to pasture was part of the master's business, and the only question was whether it was done at the right time, and that, inasmuch as the boy had been engaged in the master's business in taking the cattle to pasture, it was his duty, as part of the same business, to return the horse to his master's stable. Note specially here that what the boy did on the outgoing trip was strictly part of the master's business—carrying the cattle to pasture—and, as a matter of course, that it was also part of his duty to the master to return the horse after executing the duty of taking the cattle to pasture. I repeat, what the servant did here, on the outgoing trip to Waverly, was no part of the master's business whatever; and, as a matter of course, in coming back he was returning, not from doing the master's business, but from an independent journey of his own.

In the case of *Sleath* v. *Wilson,* 9 Carr. & Payne, 607 (38 Eng. Com. Law Rep., 249), the case was simply that the master

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had intrusted the servant generally, as in the case of Mulvehill, *supra,* with the control of his carriage; and the servant, after having, on the outgoing trip, taken his master to Stamford street and setting him down there, instead of going straight home, deviated from his route to deliver a parcel of his own, in the Old Street Road, and, in returning, injured an old woman. This, like the case of the boy driving the cattle to the pasture, is, I think, plainly a case of mere deviation from the master's business, not total departure therefrom. Note specially, on the outgoing trip the carriage driver was engaged in the master's business—driving the master himself—and it was his duty, of course, to the master, to return the carriage home. It is to be observed also, with respect to this case, that the case of *Lamb* v. *Palk,* 38 Eng. Com. Law Rep., 261, makes clear what is here held in the Sleath case. In this last case "a van was standing at the door of A., from which A.'s goods were unloading, and A.'s gig was standing behind the van. B.'s coachman, who was driving B.'s carriage, came up, and, there not being room for the carriage to pass, the coachman got off his box and laid hold of the van horse's head. This caused the van to move, and thereby a packing case fell out of the van upon the shafts of the gig, and broke them. Held, that B. was not liable for this, since the coachman was not acting in the employ of B. at the time this matter occurred." The Sleath case, like the Mulvehill and Weber cases, is a case of mere deviation from the master's service. In all three the servant was engaged in the master's business in the outgoing trip and on the return trip, but simply on the return trip deviated from the master's service.

In the case of *Ritchie* v. *Waller,* 63 Conn., 155 (28 Atl., 29; 27 L. R. A., 161; 38 Am. St. Rep., 361), the master had employed a farm laborer to haul manure from a brewery to his farm. He went with him once, and showed him the usual route. Afterwards he directed the laborer to go and get manure, and Blackwell, the servant, with the wagon and horse of the de-

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fendant, went to the brewery and procured a load of manure, and, in returning, instead of pursuing the usual route, he deviated slightly therefrom and went to see a shoemaker about mending his shoes. While he was in the shop the team ran away and injured the plaintiff, and the court said "that this, as was plainly shown, was a case of mere deviation." Note specially that on the outgoing trip he was engaged in the master's business, and that he on the return trip was hauling the manure for his master, and simply deviated to see about mending his shoes. The court, at p. 162 of 63 Conn., p. 31 of 28 Atl. (27 L. R. A., 161; 38 Am. St. Rep., 361), say: "In cases of deviation the authorities are clearly to the effect that a mere departure by the servant from the strict course of his duty, even for a purpose of his own, will not, in and of itself, be such a departure from the master's business as to relieve him of responsibility. 'Not every deviation of the servant from the strict execution of his duty, nor every disregard of particular instructions, will be such an interruption of the course of employment as to determine or suspend the master's responsibility. But where there is not merely deviation, but a total departure, from the course of the master's business, so that the servant may be said to be "on a frolic of his own," the master is no longer answerable for the servant's conduct.' Pollock on Torts, side p. 76." Again, at p. 165 of 63 Conn.; p. 32 of 28 Atl. (27 L. R. A., 161; 38 Am. St. Rep., 361), the court say: "Applying these principles to the case at bar, the question for the court below was whether or not Blackwell for the time being totally departed from the master's business and set out upon a separate journey and business of his own." To me, a stronger case for appellee could hardly be cited. It states the precise distinction between deviation and departure from the master's business, which, as I conceive, my brethren have unconsciously confused.

In the case of *Williams* v. *Koehler,* 41 App. Div., 426 (58 N. Y. Supp., 863), the facts were: "The plaintiff, a boy seven years old, was standing at the edge of the sidewalk, by the side

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of a coal box which stood there, looking at other boys playing in the street. There was a push cart in the carriageway, immediately in front. The driver of one of the defendant's beer trucks left his truck and team standing unattended in the street, in front of a saloon near by, while he went in to see a sick friend. During the driver's absence the horses started, and when they had gone from twenty to forty feet a stranger stopped the team and drove them back to the saloon. In so doing he drove the truck against the push cart, which, being overturned, threw the boy against the coal box. The driver of the truck testified that he was on his return to the brewery, having delivered all the beer, and his truck was full of empty kegs. He further stated that where the accident occurred was not on his direct route to the brewery, but that he had deviated from his course for a couple of blocks for the sake of stopping to see a friend. . . . The duty of the driver's employment required him to drive the truck back to the brewery. Though he deviated from his direct road, still the conduct and management of the team on the course he took were none the less services in the course of his employment. At most, his acts constituted misconduct in his employment, not an abandonment of it. The case is not at all similar to one where the servant takes his master's team for a purpose unauthorized and solely his own. In such a case the driver would not be acting in the service of his master. But here the driver did not take the truck as a vehicle or means of transporting himself the two blocks he went out of his way; but, intending to go to see his friend, and at the same time intending to return the truck to the brewery, as was his duty, he drove the truck over the route adopted for the very purpose of continuing his service, in taking charge of the team and truck, and not for his own purposes. . . . It is true that the act of the driver in going into the saloon was not in his master's service. For that reason had he, while entering the saloon, by his carelessness run against and injured any one, the master would not have been liable. It was not the going

into the saloon that caused the accident, but leaving the horses unattended and untied; and this was negligence in the master's business, for it was the duty of the master not to leave his team unsecured." The court puts it so plainly that we cannot add to the clearness of what the court said at pp. 427, 428, of 41 App. Div.; p. 864 of 58 N. Y. Supp. This I also regard as a strong authority for appellee. The servant was engaged in the master's business—driving his truck and team on a return trip to the brewery with empty kegs. It was his duty, as said, to drive the truck with the kegs back to the brewery, and all that he did was simply to deviate at the time he went into the saloon to see a sick friend; and the injury was caused, not by going into the saloon, but by negligence in leaving the horses unattended. The case, as I see it, has no resemblance to the case at bar.

In a late case on this whole doctrine of deviation—the case of *Quinn* v. *Power,* 87 N. Y., 535 (41 Am. St. Rep., 392)—Finch, J. (one of the greatest judges New York has ever produced), makes the difference between deviation and departure perfectly plain. In that case the master's business consisted in transporting persons and freight over the river on a ferryboat between Hudson and Athens. The plaintiff, who wanted to get on a canal boat standing out in midstream, was permitted by the servant managing the ferryboat to come on board at Athens, and was to be transferred to the canal boat, in midstream, as a matter of favor. In doing this a slight deviation from the usual track of the boat across the river was made, but the ferryboat at the time was transporting freight and passengers between Hudson and Athens. The court say: "At the most, it appears to us a case where the servant, while acting in the master's business and within the scope of his employment, deviated from the line of duty to his master and disobeyed his instructions." And on p. 540 of 87 N. Y. (41 Am. St. Rep., 392) added, citing certain cases: "These cases are useful to illustrate the idea that there may be a deviation from the serv-

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ant's duty in his employment, and that, too, for some purpose or from some motive of his own, without his ceasing to be an actor within the scope of his employment and in the range of his master's business. The case is put by the appellant mainly on the ground that the officers of the ferryboat, in transferring the passenger to the canal boat, were simply doing the latter a personal favor, and so carrying out a separate and independent purpose of their own. That is not in all respects a correct view of the transaction. What he did was in the natural line of his employment, might well have been regarded by him as a duty due to his master, and an act which would benefit rather than injure his business. It was an act within the general scope of that employment. It was the transportation of a passenger, if not across the river, at least partly across, and none the less so because no compensation or fare was demanded." Here, too, as it appears to me, is another strong case for appellee—a slight case of mere deviation. The servant at the time was engaged in the transporting of freight and passengers—the business of his master. Was this servant in the case at bar engaged in the business of the master in taking Barmore, the sick man, three miles away from where the chips were, to Waverly? What business of the master, pray?

In the case of Geraty, 16 App. Div., 174 (44 N. Y. Supp., 659), the driver and helper of one of the defendant's large trucks, which were employed in transporting and delivering ice from defendant's storehouse to customers in the city, deviated from the usual route and stopped at a restaurant to get breakfast. The ice had been negligently loaded on the truck, and a block of ice fell off and injured the plaintiff. The court said: "The rule as laid down by the latest cases in the English courts is that a master is responsible for an injury resulting from the negligence of his servant while driving his cart, provided that the servant is at the time engaged in his master's business, even though the accident happens in a place to which his master's business did not call him. But if the journey upon which the

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servant starts be wholly for his own purposes, and without the knowledge or consent of the master, the latter will not be liable." The court further says: "In this case the act that the servant was employed to do was to take this ice from its warehouse to the Grand Central Station. The route taken was not the direct route. But that fact of itself does not relieve the master from his liability. Within the cases above cited, the liability still continues unless the deviation is made, not in the prosecution of the master's business, but for some other and different purpose. The distinction is well illustrated in the cases of *Cavanagh* v. *Dinsmore,* 12 Hun., 465, and *Sheridan* v. *Charlick,* 4 Daly, 338, in which the servant, having been directed to use his master's horse and carriage for a particular purpose, and then to put it up in the stable, instead of doing so, after the master's business had been performed, went off in another direction, in the prosecution of his own affairs and for his own purposes. In those cases it was held that the enterprise undertaken by the servant, during which the accident happened, being solely for his own purposes, the defendant was not responsible for it. In this particular case, so long as Sweeney and McQuade were engaged in taking this ice to the Grand Central Station, they were engaged in the prosecution of the master's business, and it was liable for their acts. The liability ceased, if at all, only when they were not engaged in taking the ice to the place where they were directed to take it. . . . We think that the defendant was not entitled to be relieved from liability if the accident happened after Sweeney had taken his place upon the wagon and resumed his course toward the Grand Central Station, and the accident was caused by the slipping of the ice from the wagon. At that time Sweeney, whatever may have been his object in deviating from the direct route, was again proceeding to deliver the ice. He had accomplished whatever purpose he intended to accomplish by the deviation, and had resumed the execution of the work which the defendant had intrusted him to do. . . . If he had been forced by a block-

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ade of the streets to turn out of the direct route and go in the direction in which he did go, no one would doubt that the master would be liable, because he would have been engaged, when he was moving in that direction, in the transportation of the ice to the place where it was intended that he should take it. . . . We think that cannot be the rule; but if the master's liability has been suspended while the servant has deviated from the route for his own purpose, the liability again attaches after he has resumed the prosecution of the master's business, if the conditions which then existed have not been altered by the act of the servant, so that some new negligent cause has intervened, for which the master was not originally liable. That is not this case. . . . If there had been a suspension of liability, that suspension had come to an end, because he had resumed the prosecution of his master's business." Note specially here, also, that the servant was engaged in his master's business on the outgoing trip—hauling ice; and not only so, but, as stated by the court, was engaged in the master's business after the suspension was over—hauling ice. What possible analogy can there be between a case of slight and temporary deviation from the master's business, like this case, and a total departure, as I see it, from the master's business, like the case at bar?

In the case of *Chicago* v. *McGinnis,* 86 Ill. App., 38, the facts were that the master's business consisted in having goods delivered in the city by a wagon owned by the master, and that the servant, while engaged in delivering appellant's goods, deviated slightly from the regular route to call upon his wife, and that, after leaving the house of his wife, he was again proceeding upon his master's business, when a boy, who had climbed upon the steps of the wagon, was injured. It further appears that the place where the driver stopped to see his wife was within the territory within which he delivered the goods of appellant; and what did the court say at p. 41 of 86 Ill. App.? Simply this: "We are of the opinion that, applying the

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rule to the facts of this case, it cannot be held that the driver of appellant, when he again started on his business of delivering goods of appellant, after having stopped upon an errand of his own, was not engaged in his master's work, within the scope of his employment." The servant was engaged in the master's business, delivering goods within his proper territory, and simply deviated to see his wife, and, after such deviation, resumed the master's business, and, after such resumption and while engaged in the master's business, inflicted the injury. Can there be any similarity between that case and the case at bar?

In the case of *Missouri, etc., Ry. Co.* v. *Edwards*, 67 S. W., 891, we have a case not decided by the supreme court of Texas, but by one of its courts of civil appeals—an inferior appellate court. There a brakeman of appellant, while the train was standing still, went to a saloon or restaurant at one side of the train, and, while hurriedly returning to board the train, then just moving away, ran against and injured appellee. The court said nothing, except that, while he might not have been on his master's business in stepping aside to the saloon or restaurant, he was when returning to resume his accustomed place of service. The case is not reasoned out, and not a single authority is cited, and it is the judgment of an inferior tribunal. It may be barely possible to sustain the case on the theory that the servant was in the service of the master in attending to his business about the car, and had simply deviated from that service in going into the saloon or restaurant to get, it may be, some necessary meal. If this be not the true explanation of the case, then I do not hesitate to say that the decision is unsound.

In the case of *Pittsburg, Cincinnati, etc., Ry. Co.* v. *Kirk*, 102 Ind., 399 (1 N. E., 849; 52 Am. St. Rep., 675), it was the duty of one Cronin, in charge of a hand car, to meet his crew each morning at seven o'clock, and proceed on the car with men and tools along the line of his section, direct necessary repairs, and return in like manner to the tool house, at the depot, at six o'clock P.M. On the evening of the accident, after

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quitting work and while returning, Cronin encountered an engine and train of cars which obstructed his further progress, and he thereupon directed the car to be transferred to the line of the Cincinnati, Hamilton & Indianapolis Railway Company, lying parallel to the track he was on; and, while proceeding on the line of the latter, his car was negligently propelled against the car on which Kirk, an employe of the latter railroad company, was, and a collision occurred, and Kirk was injured. And the court say: "To undertake to lay down a general rule applicable to all cases would not only be difficult, but impossible. But we think this much may be said: That where a servant is engaged in accomplishing an end which is within the scope of his employment, and, while so engaged, adopts means reasonably intended and directed to the end, which result in injury to another, the master is answerable for the consequences, regardless of the motives which induced the adoption of the means, and this, too, even though the means employed were outside of his authority and against the express orders of the master. 2 Thompson on Negligence, 889, sec. 6; Wood, Master & Servant, pp. 593, 594. . . . It was part of the section foreman's duty to return with his car, tools, and crew over the defendant's track to the tool house, near the depot, as well as to observe the condition of the track, so as to have his car and tools there ready for use at 7 o'clock the next morning. The prescribed route was over the track of the railroad in whose service he was. He had no authority to go upon the other, but, encountering an obstacle on the line of his employer, either for his own convenience or possibly to accommodate the other servants of the master, and thus make them better disposed toward its service, he judged it convenient or expedient, rather than wait until the appellant's line was cleared, to invade the neighboring line; and by that means he attained the end of delivering the car, tools, and crew at their destination. In all this, whatever his motive was, he was pursuing the master's service—that of returning the car, tools, and crew to their appointed place, as

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was his custom and duty; and while he pursued the service in an unauthorized and possibly forbidden way, he and those with him were during the time in the relation of servants to the appellant. Concede that in going off the employer's line he pursued a course which was beyond his authority; his purpose in doing so was nevertheless to accomplish an end within his employment, and reasonably, as he supposed, fitted to reach that end. . . . In this case it cannot be said that the servant had stepped aside from the master's service for a purpose of his own. The most that can be said of it is that, in accomplishing an end within the scope of his employment, he adopted a method wholly unauthorized, which was possibly resorted to to accommodate himself and those under him; but, whatever the motive may have been, since the end aimed at was, as averred in the complaint and as the judgment must have found, within the line of service, it cannot be said, upon the evidence, that he was acting without authority in a matter not connected with his employment." Note here, specially, that the court expressly held that, in all that he did, he was pursuing his master's service—that of returning the car, tools, and crew, as was his custom and duty; and whilst the method which he adopted might be unauthorized, yet what he was actually doing was within the master's service. And note this case is based upon the doctrine of *Quinn* v. *Powers,* both cases being cases of mere temporary deviation.

I have thus gone, case by case, over each of the authorities cited in support of the proposition that what the servant did in this case, in going away from the place where the chips were, to a distance of three miles, to the town of Waverly, and in returning therefrom, was work done in the master's business, and not a total departure from the master's business, or, to put it more strongly for appellant, was a mere case of deviation in the master's business, and not a case of total departure therefrom. If now one will specially note that in every one of these cases, with the possible exception of the case from the court of

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civil appeals of Texas, the servant was uniformly engaged in the transaction of his master's business on the outgoing trip, and in the return therefrom merely deviated incidentally and temporarily, for some purpose of his own, but still whilst engaged in the performance of the master's business, I apprehend he will find it logically impossible to reconcile the reasoning and conclusion of my brethren in the case at bar with a single one of the authorities cited in support thereof. The boy took the cattle to pasture and returned the horse; the servant in the other cases delivered the ice or beer or goods or manure, or what not, and returned the vehicle to the master's home, and incidentally deviated for some business purpose of his own—to see his wife, to mend a shoe, to visit a friend, etc. Can it be seriously contended that the servant in the case at bar, leaving his territory for chips and splinters, and going three miles away therefrom, and in going doing absolutely nothing in the line of service to his master, but simply and merely carrying a sick man for accommodation, did not depart absolutely from his master's service? To my mind the conclusion is irresistible that the railroad company cannot be held liable for this injury on the first ground in the opinion of the majority.

Secondly, was the instrument—the railroad tricycle—a dangerous instrument, within the meaning of the rule of law on that subject? Undoubtedly there is a class of instrumentalities or appliances or agencies which are dangerous in themselves—inherently dangerous—concerning which two duties are imposed by law upon the servants of the master who have the custody of such instrumentalities or agencies. These two duties are, first, the duty of proper use of such agencies; and, second, the proper custody of such agencies. If one is injured either by the improper use of the agencies or by the agency itself, such injury resulting from careless custody, in either case the master is liable. In all the books and decisions the line of demarcation between such agencies and instrumentalities as are inherently dangerous and those which are not inherently dan-

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gerous is well marked. Multitudes of decisions could be cited to show this line of demarcation, but the bar are familiar with the distinction. Amongst those which are thus inherently dangerous may be mentioned dynamite, gunpowder, torpedoes, electricity, and the like. Injuries may occur from the mere improper custody of such agencies as these, and in such case, since the master, in selecting agents to whom the custody of such agencies is intrusted, must be held responsible because of the fact that he cannot shift the responsibility of their careful and proper custody to the agent; the master himself must be held liable. And this liability is due directly not to negligence in the use of such agencies, but to the inherent character of such agencies, as dangerous. But there are many instrumentalities and agencies, the danger of which is not due to their inherent character, but to their negligent use; and in this latter class of agencies or instrumentalities the liability of the master must depend exclusively upon the single question of whether the agent, in their use, has been negligent. This, as I understand it, is the true and perfect distinction between the two classes of agencies or instrumentalities. This distinction is plainly pointed out in 1 Thompson on Negligence, sec. 523, where that learned authority says: "The railway company was under the duty of keeping the dangerous agencies carefully guarded. It committed this duty to its servants. It was not merely their duty to use them, but also to guard them; and for the failure of this duty the master was liable, on the footing of its being negligence within the scope of the employment of the servants." In this class of cases, as remarked by Justice Finch, "it will make no difference, in his liability, if the servant did so to effect some purpose of his own. In either case the master has committed to the servant the discharge of a duty which the law has imposed upon the master for the safety of third persons, and the servant has abandoned that duty; and this is enough to render the master liable, without any regard to the motive of the servant."

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Dissenting opinion.

The case of *Erie Railroad Company* v. *Salisbury* (the push-car case) was a case in which six justices concurred and five dissented; and it is not, as I see it, a case belonging under the head of dangerous agencies. It is rested, as the opinion shows, upon the negligent use of the push car.

The distinction which I have adverted to is clearly drawn in the two following cases: In the first, cited by the majority—*Pittsburg* v. *Shields*, 24 N. E., 658, at p. 660 (8 L. R. A., 464, at p. 467; 21 Am. St. Rep., 840)—the court say, speaking of a hatchet: "A hatchet is not an instrument of danger, within the rule above stated. It includes only such instruments as are such within themselves. The danger of a hatchet is in the hand and the spirit of the man who may use it. If in this case the instrument left on the track had been a hatchet, the company would not have been liable to a child who might afterwards have picked it up and been injured by it; for the company would have been under no such duty as to its custody as it was under in regard to this dangerous explosive." In the case of *Loop* v. *Litchfield*, 42 N. Y., 358, 359 (1 Am. St. Rep., 513), treating the distinction I have above set out, the court say: "The appellants recognize the principle of this decision, and seek to bring their case within it by asserting that the fly wheel in question was a dangerous instrument. Poison is a dangerous substance. Gunpowder is the same. A torpedo is a dangerous instrument, as is a spring gun, a loaded rifle, or the like. They are instruments and articles in their nature calculated to do injury to mankind, and generally intended to accomplish that purpose. They are essentially and in their elements instruments of danger. Not so, however, an iron wheel, a few feet in diameter and a few inches in thickness, although one part may be weaker than another. If the article is abused by too long use or by applying too much weight or speed, an injury may occur, as it may from an ordinary carriage wheel, a wagon axle, or the common chair in which we sit. There is scarcely an object in art or nature from which an injury may not occur

under such circumstances. Yet they are not, in their nature, sources of danger; nor can they, with any regard to the accurate use of language, be called dangerous instruments. That an injury actually occurred by the breaking of a carriage axle, the failure of the carriage body, the falling to pieces of a chair or sofa, or the bursting of a fly wheel, does not in the least alter its character."

In the case at bar it seems perfectly clear to me that the injuries sustained by appellant were not due to any inherent danger in the tricycle, within the rule of law on that subject, but exclusively to the negligent use of the tricycle by Watson. It is impossible for me to understand how there could be any inherent danger in this tricycle. It does not, I hold, come within the rule applicable to dangerous agencies. The whole trouble here is not that the tricycle, because of any inherent dangerousness within itself, injured appellant, but simply and merely that this man Watson recklessly and willfully ran over the appellant with the tricycle. It is a case, therefore, on the second branch of the argument, of nothing else than the mere reckless and negligent use of an instrument in itself naturally harmless. The numerous cases where persons have been injured by carriages, vehicles of various kinds, mowing machines, and things of that sort, axes, hatchets, and the like, are all seen to be, when properly classified, cases where the injury was due merely to the negligent use of the particular thing, not to any inherent danger in the thing itself. In other words, we may say, broadly and distinguishingly, that the difference is between explosives and the like, as gunpowder, dynamite, torpedoes, electricity, etc., and other things. In the former the injury is due directly to the inherently dangerous character of the agency; in the latter, exclusively to the negligent use of the thing by some person—the thing being in itself not dangerous. A railroad tricycle is, in my judgment, plainly in the latter class.

I do not often dissent, making it a rule of my judicial life

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not to dissent where the difference between myself and my brethren does not amount to conviction; but where that difference is so great as that it does amount to conviction, then I think it my duty to dissent. It amounts to conviction in this case, where I think the principle here stated fraught with great danger. With all deference to my brethren, I greatly fear that this decision will certainly return to plague the court, and have therefore felt constrained to set forth somewhat at large the reasons compelling me to dissent.

JEFFERSON D. HIGHTOWER ET AL. v. WILLIAM E. HENRY.

1. **EVIDENCE.** ***Writing. Parol.***
   The terms of a written contract cannot be varied or enlarged by parol.

2. **SAME.** ***Concrete case.***
   A duly executed writing in these words, "On or before November 15th, next after date, I promise to pay to the order of Hightower & Cassity three hundred and sixty dollars, rent for ninety acres land at four dollars per acre, of Laban plantation, for the year 1901. Value received," is not only a promissory note, but a contract which cannot be varied by parol evidence showing an agreement on the part of the payees and landlords to put a fence around the leased premises.

3. **DAMAGES.** ***Claimant's fault in part.***
   Where it appeared that a part of the damages claimed was caused by claimant's own wrong, he should not be awarded anything in the absence of all evidence showing the extent of the damages so caused.

FROM the circuit court of, first district, Bolivar county.

HON. A. MCC. KIMBROUGH, Judge.

Henry, the appellee, was the plaintiff, and Hightower and another, appellants, were defendants in the court below. From

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a judgment in plaintiff's favor the defendants appealed to the supreme court.

Defendants, as landlords, sued out an attachment for rent, and caused the same to be levied upon plaintiff's, the tenant's, cotton. This suit, an action of replevin for the cotton, was then begun by the plaintiff, Henry. The defendants, Hightower and another, appellants, pleaded an avowry, that the cotton was rightfully seized for rent due to them and in arrear from their tenant, Henry, the appellee. To this avowry the appellee, Henry, replied, setting up that no rent was due by reason of the failure of the defendants, the landlords, to comply with their contract and build a good and sufficient fence for the protection of crops upon, and the exclusion of cattle and other live stock from, the leased premises, and that thereby the plaintiff had been damaged in a sum greater than the amount claimed for rent by the defendants. This replication was traversed by the defendants, and upon the issue thus presented the case was tried. The opinion of the court contains a further statement of the facts upon which the decision was based.

Charles Scott, Woods & Scott, and *Frank Johnston,* for appellants.

The evidence of the verbal contract of lease is incompetent and inadmissible. 2 Parsons on Contracts (5th ed.), 548; Bishop on Contracts, 128; *Young* v. *Jacoway,* 9 Smed. & M., 212; *Brantley* v. *Carter,* 4 Cush., 282; *Lumber Co.* v. *Lumber Co.,* 71 Miss., 944; *Herndon* v. *Henderson,* 41 Miss., 584; *Cocke* v. *Bailey,* 42 Miss., 81; *Kerr* v. *Kuykendall,* 44 Miss., 137; *Wren* v. *Hoffman,* 41 Miss., 616; *Baum* v. *Lynn,* 72 Miss., 936; *Thompson* v. *Bryant,* 75 Miss., 15; *Coats* v. *Bacon,* 77 Miss., 320.

The instrument under consideration specifies the rent reserved, the property leased, the term of the lease, and the time for the payment of the rent. It thus stands as a complete and explicit contract of lease.

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It is true that the tenant alone signed the instrument, but this is a wholly immaterial consideration for two conclusive reasons: First, the acceptance of this written contract, which contained the recital that there was a leasing of the property specified for a year, bound the landlords by its terms; and in the second place, it stands as an executed contract so far as the landlords are concerned.

The court below should have granted the peremptory instruction for the defendants.

As a proposition of law the plaintiff was not entitled to any recovery on his claim for damages without satisfactory evidence showing the amount of damage to his crop that was done by the cattle that got into his field through the negligence of the landlords. This was not done, and there was no effort whatever made by the plaintiff to separate or distinguish the damage that was caused by his own acts and negligence.

Sillers & Owen, for appellee.

Farmers and men not versed in the rules of business dealings are not held to the same strict methods that business men are. An account stated will bind a merchant or a lawyer within a time and under circumstances that will not bind a farmer or laborer or other persons ignorant of the usages of business. The courts have felt it necessary to relax the rules of strict constructions when dealing with the unlearned class. *Anding* v. *Levy,* 57 Miss., 51.

There seldom is a contract made between landlord and tenant that matters other than the rent do not come into it. There is nearly always a contract on the part of the landlord or the tenant to repair fences or houses, clean out ditches, and keep up fences, made outside of the rent note, and great injustice would be done if the courts should hold that the execution of a rent note shuts out proof of these items.

The rent note is only one side of the contract. It is only a promise to pay the rent by the tenant, and is not intended to

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represent the entire contract between the landlord and tenant. The landlord is, in ninety-nine cases out of a hundred, better versed in business methods and the law than his tenant, and if he is allowed to make a verbal contract with his tenants, and afterwards make a rent note nullifying all of the contract, except the promise to pay rents, it will work great hardship on the man who earns his bread by the sweat of his brow—a class of whom the courts are always considerate, as they should be.

The sole question for the consideration of the court is whether a rent note is such a contract as will wipe out all verbal agreements to repair; all other questions have been settled by the jury.

WHITFIELD, C. J., delivered the opinion of the court.

The appellee executed the following note to the appellants: "Mound City, Miss., May 1st, 1901. On or before November 15th, next after date, I promise to pay to the order of Hightower & Cassity $360, rent for ninety acres of land at four dollars per acre, of Laban plantation, for the year 1901. Value received. W. E. Henry." This is not simply a promissory note, but a contract embracing all the terms of a contract between the parties. On the trial in the court below the appellee offered testimony to show that early in the year appellants agreed verbally that they would repair the fences, and that appellee would not have made the contract unless Hightower & Cassity had agreed to put a good fence around the place to keep out the cattle. This testimony the court below, over the objection of the appellants, admitted. A majority of the court are of the opinion that this testimony was clearly incompetent. It would be adding to the terms of a written contract a new term by parol. A majority of the court are also of the opinion that the testimony shows that part of the damage sustained by the depredations of cattle was due to the negligence of appellee himself in leaving down gaps in his fence, and that the testimony fails to show what part of the damage was due to the

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negligence of appellants, and that, on this state of the evidence, the court might well have given a peremptory instruction for the plaintiffs.

The result, in either view, is that the judgment must be, and is hereby, reversed, and the case remanded for a new trial.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY v. HELEN H. HUBBARD.

DAMAGES. *Growing crop. Destruction.*

If a growing crop be destroyed, a jury may estimate, with the aid of testimony, its value at the time of its destruction, in view of all the circumstances, existing at any time before the trial, favoring or rendering doubtful the conclusion that it would have matured, and of all the hazards and expenses incident to the process of growth, although it cannot be shown with absolute certainty that, but for its destruction, it would have matured.

FROM the circuit court of, second district, Coahoma county.

HON. SAMUEL C. COOK, Judge.

Mrs. Hubbard, the appellee, was plaintiff, and the railroad company, appellant, defendant in the court below. From a judgment for $650 and costs in plaintiff's favor the defendant appealed to the supreme court. The verdict was for $750, but the court below required a remittitur of $100. The suit was for the statutory penalty (Code 1892, § 3561) for not maintaining a sufficient cattle guard, and also for damages to crops resulting from the depredations of cattle which entered plaintiff's inclosed fields over a defective cattle guard. The state of the evidence was adjudged such as to justify a peremptory instruction for plaintiff so far as concerns the statutory penalty, and this branch of the case presented only a question of fact. The opinion states the evidence touching the actual damages demanded.

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Mayes & Longstreet, and *C. N. Burch,* for appellant.

There was no sufficient, competent, and legal proof offered by plaintiff, or supplied in any wise by defendant, from which the jury were warranted in estimating actual damages.

When a plaintiff seeks to make out his case he must offer to the jury some satisfactory, competent, and legal data and evidence on which they may base a verdict. A verdict which is forced or strained by the jury out of evidence wholly insufficient will not be sustained by the court.

There are two methods of computation approved by the courts. One is to make proof of the value of the ungathered crop as it stood ungathered in its existing condition, if such proof can be made, and the other is to make proof of the value of the matured crop and to follow this up with proof of all expenses incidental to the gathering, hauling, preparation, and sale of the crop in open market.

Neither of these methods of computation was hinted at in the case at bar. Not only was the testimony of the witnesses so confused and vague that it would have been difficult for the mind to reach a certain conclusion as to the actual damage, if any, done by the cattle, but it did not afford any means by which the jury could legally have made the proper estimate.

"In an action of trespass against the owner of hogs for injuries done by them to plaintiff's crops, he cannot be allowed to prove what amount of crop he would have made without the injury; but the damages would be, perhaps, the value of the crops at the time of their destruction, so far as they were destroyed." *Gresham* v. *Taylor,* 51 Ala., 505.

"The measure of damages against a railroad company for injuries to growing crops caused by defendant's failure to construct cattle guards is the market value of the crops when matured, less the expense of fitting them for market, from the time of the injury, and diminished by the value of the portion of the crops saved." *Smith* v. *Chicago, etc., R. Co.,* 38 Iowa, 518.

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"In an action for damages for the destruction of growing and immatured cotton, the measure of damages is the value of the cotton at the time it was destroyed, with interest." *Mo. Pac. Ry. Co.* v. *Wise,* 3 Wilson Civ. Cas. Ct. App., sec. 389.

"The measure of damages in an action for the destruction of standing crops is their value at the time of destruction." *Colo. L. & W. Co.* v. *Hartman,* 5 Colo. App., 150 (38 Pac., 62); *Wamble* v. *Graves,* 1 White & W. Civ. Cas. Ct. App., 481; *Railroad Co.* v. *Bayliss,* 62 Tex., 570.

"In an action for injury to growing crops the measure of the damages is the value of the crop in its condition at the time of the injury." *Lommeland* v. *Railway Co.,* 35 Minn., 412 (29 N. W., 119).

"Where growing corn was destroyed by cattle, after the owner had expended on the crop all the labor it was necessary to expend before harvesting, held, that although the destruction of the corn at that stage of its growth was the loss of all the corn that would have matured had it not been destroyed, the owner could recover only the value of the corn at the time of the injury." *Richardson* v. *Northup,* 66 Barb., 85.

"Evidence as to what would have been the value of the crops if they had matured is too speculative to be admissible in an action against a railroad company for destroying and injuring growing crops by constructing its railway through a field containing them." *Railway Co.* v. *Benitos,* 59 Tex., 326; *Railway Co.* v. *Carter,* 25 S. W., 1023; *Railway Co.* v. *Lyman,* 57 Ark., 512 (22 S. W., 170); *Railway Co.* v. *Paup,* 22 S. W., 213; *Railway Co.* v. *Ritz,* 33 Kan., 404 (6 Pac. Rep., 533); *Taul* v. *Shanklin,* 1 White & W. Civ. Cas. Ct. App., sec. 298; *Railway Co. . Johnson,* 3 Wilson Civ. Cas. Ct. App., 26; *Railway Co.* v. *Nicholson* (Civ. App.), 25 S. W., 792, note and authorities; 8 Am. & Eng. Ency. Law (2d ed.), 330.

J. W. Cutrer, for appellee.

It is very difficult in a case like this to ascertain with anything approaching mathematical accuracy just how much dam-

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age plaintiff has suffered. To hold plaintiff to any such stiff rule would be to place an almost insuperable obstacle in the way of farmers suing for damaged crops. Nor do the courts lay down any such stiff doctrine. It must be remembered that plaintiff was suing in tort, and not for breach of contract. The distinction between the two is clearly drawn in *Railway Co.* v. *Hanes,* 69 Miss., 160.

When a person has been injured by the destruction of his property, any rule which would make recovery almost impossible would certainly be a bad rule. Any attempt on the part of appellant to pin the appellee down to absolute certainty in the proof of his damage will certainly not be countenanced by this court. Damages to growing crops are extremely difficult to prove under the most favorable circumstances, and if every injured person is compelled to prove each and every item of damage suffered by him and to give an exact reason for his statements, very few injured persons will ever be able to recover.

"Absolute certainty is not required. The true rule on the subject is announced by the supreme court of Michigan in the well-reasoned case of *Allison* v. *Chandler,* 11 Mich., 542, 555. Shall the injured party be allowed to recover no damages (or merely nominal) because he cannot show the exact amount with certainty, though he is ready to show, to the satisfaction of the jury, that he has suffered large damages by the injury? Certainty, it is true, would be thus attained; but it would be the certainty of injustice. Juries are allowed to act upon probable and inferential as well as direct and positive proof. And when, from the nature of the case, the amount of the damages cannot be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case having any tendency to show damages or their probable amount, so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit." 1 Sedgwick on Damages (8th ed.), 246.

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TRULY, J., delivered the opinion of the court.

The granting of the peremptory instruction to award the statutory penalty for failure to maintain a necessary and proper cattle guard was correct. The contention mainly relied on by appellant is that there was no specific proof of actual damage sufficiently definite to warrant a jury in returning a verdict in any amount. The witness Hubbard testified that twelve acres of corn had been twice completely destroyed—once when the crop was growing, again after the corn was matured; that he estimated the loss in bushels at five hundred; that the crop of cotton had been damaged to the extent of fifteen or seventeen five-hundred-pound bales; that all of the corn belonged to appellee, and was worth sixty-five cents per bushel; that one-third of the cotton would have been the property of appellee if gathered, and was worth from ten to eleven and one-half cents per pound; and that at least one-half of the entire loss was directly attributable to the depredations of cattle that entered the field over the ineffective cattle guard. Further on, just before the close of his testimony, he stated that the value of the corn crop at the time of its destruction was $250, and that the damage to the cotton crop caused by the cattle was between $700 and $800. This testimony was accepted by the jury, and we think it ample to sustain a judgment for the amount which was allowed to stand in this case. Mathematical certainty as to the amount of damage suffered is not required in actions of tort of this character. The amount of damage inflicted by injury to, or destruction of, property is, at last, like the value of the property itself, "only a question of estimation, varying as the individual judgments of men may differ." For this reason the law commits to the jury the duty of arriving at the amount of damage suffered, and this can only be arrived at by an estimation based upon the testimony of the witnesses. Damages must be certain both in their nature and the cause from which they proceed; but the amount in cases like the one here presented—where a crop has been partly de-

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stroyed while growing, and partly after maturity, but before gathering—must, from the very nature of things, be calculated from statements detailing to the jury the exact situation of affairs as they existed at the time of the injury or destruction. Any other rule would debar the plaintiff from all chance of recovery in many cases of similar character. The conclusion announced above is approved by text writers of most eminent distinction. 1 Sedgwick on Damages, p. 246. In the recent edition of the very valuable work of Sutherland on Damages, the rule is thus stated (p. 339): "If a growing crop is destroyed, it can, of course, never be shown with absolute certainty that but for its destruction it would have matured, nor that one party who is stopped by the other in the performance of a special contract would otherwise have proceeded to a complete execution of it so as to entitle himself to its full benefits. Nor is it a matter of law that the jury shall assume that the crop would have matured or that the contract would have been fulfilled. The jury may estimate, with the aid of the testimony, the value of the crop at the time of its destruction, in view of all the circumstances existing at any time before the trial, favoring or rendering doubtful the conclusion that it would attain to a more valuable condition, and all the hazards and expenses incident to the process of supposed growth or appreciation." The crop no longer being in existence, its value could only be arrived at by calculation based on competent proof. We think that course was followed in the case at bar.

Affirmed.

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CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY v. WALTER L. BAKER.

DAMAGES. ***Exemplary. When not recoverable.***

A telephone company is not subjected to liability for exemplary damages by the acts of its manager in removing the telephone from the residence of a patron and requiring him, in sending long-distance messages, to prepay charges and send them from the exchange, when such patron, on the claim of poor service, had refused to pay full rental for his residence telephone, in the absence of evidence of wanton, oppressive, insulting, or willful conduct on the part of the manager.

FROM the circuit court of, second district, Panola county.

HON. J. B. BOOTHE, Judge.

Baker, the appellee, was plaintiff, and the telephone company, the appellant, defendant in the court below. From a judgment in plaintiff's favor the defendant appealed to the supreme court.

The suit was brought in a justice of the peace's court, and the complaint was that, while plaintiff was a subscriber for a telephone, defendant refused to give him long-distance telephone connection, and took his telephone out of his house and refused to put in another one, and that this was a discrimination against plaintiff, and was done without excuse, wrongfully, wantonly, maliciously, and willfully by defendant's manager in the town of Batesville. From a judgment for plaintiff for $200 defendant appealed to the circuit court.

The evidence on the *de novo* trial in the circuit court showed that plaintiff had a telephone in his residence, and that in the fall of 1903 he was furnished very inferior service, of which he often complained, and that when plaintiff paid the monthly rental for the telephone in October, 1903, he gave defendant notice that if the service was not improved he would not pay the full rental for the month of November; that through the month

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of November the service continued bad; that on December 5, 1903, defendant's collector presented the bill to plaintiff for the November rental, when plaintiff offered to pay all the bill except forty cents, which he claimed he was entitled to deduct on account of the bad service rendered him; that on December 8th the local manager gave plaintiff notice that if the bill was not settled in full in five days his telephone would be taken out and the bill placed in the hands of a collector, and the local manager instructed the employes on December 14th not to allow plaintiff the right to call parties at the long-distance telephone from his residence, but to require him to go to the central office and pay tolls in advance; that the telephone was discontinued on December 15th, and on the 19th it was removed from plaintiff's residence, all over the urgent protest of plaintiff; and after it was removed the local manager refused to put it back unless plaintiff would pay the forty cents and sign a contract to pay a higher price for the telephone. Plaintiff testified that the local manager had "a bad feeling for him."

The rules of the defendant company introduced in evidence are as follows: "To all Managers: All bills, both tolls and rentals, must be made out and presented for payment on the first of each month. If a subscriber does not pay his bill after it has been presented, in a courteous, polite manner, by the 15th of the month, you will notify him that unless he pays by the 20th you will be forced to discontinue service. If on the 20th the same is still unpaid, you will disconnect the line until the 23d; then, if the account is still unpaid, you will remove the telephone without further notice. You must be certain to give the subscriber sufficient notice, and call him up in person over the telephone before his instrument is removed in order to give an opportunity to settle the account."

Harris, Powell & Harris, for appellant.

There is nowhere to be found any evidence of any insult, malice, fraud, oppression, recklessness, or wantonness on the

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part of the company or its agents. Baker was notified that he must pay the full rental, and he declined to do it, insisting that the company should accept one dollar instead of one dollar and forty cents. There is no evidence that Baker sustained any pecuniary loss by reason of the defective service which he claimed existed. He does claim that he suffered some damage to his business, after the telephone was taken out, for want of a telephone, but what is not shown. The company proposed to continue the telephone if he would pay the forty cents, but Baker said he would not pay it because, as he says, "he did not want to be run over," and knowing what inconvenience he would be subjected to, if he was subjected to any, he allowed the telephone to be taken out rather than pay the forty cents.

Even should it be determined, in a controversy between Baker and the company, that he did or did not owe the forty cents or whether the company did or did not have the right to collect the forty cents, this would not make out a case for punitive damages. The company may in fact have done Baker a legal wrong, but it would not follow that he would be entitled to punitive damages. It is settled that where a defendant acts in good faith and without malice or wantonness, believing that he has a right to do the act complained of, punitive damages are not recoverable as a rule, even though there may have been a violation of the plaintiff's legal right. 12 Am. & Eng. Ency. Law (2d ed.), 25; *Railroad Co.* v. *Fite,* 67 Miss., 373.

The right of the telephone company to enforce its rule, and the reasonableness of the rule, is upheld in the recent case of *Irvin* v. *Rushville Telephone Co.,* 161 Ind., 524, the only case we have been able to find. The rule in that case was in the following words: "All moneys due this company or its toll line connections shall be payable at the office of the secretary on or before the 5th of the month succeeding the maturity of such indebtedness, and if not paid on or before said date, the service of such delinquent shall be discontinued until such indebtedness is fully paid."

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The case is an instructive one in its bearing on the case at bar, as it presents nearly all of the features which are presented here. In the first place, the suit was brought to recover penalties on account of the refusal of the telephone company to continue to serve the plaintiff. This is analogous to the claim for punitive damages in the case at bar.

The plaintiff claimed that the telephone company owed him more than he owed the company by forty-five cents, and that at the time he was disconnected and service refused him he did not owe the company a cent.

The reasonableness of the rule, or by-law, was passed upon.

It was insisted that the plaintiff was not notified, at the time he was discontinued or service refused him, why it was refused him.

It was insisted that the rule was not enforced with impartiality.

As to the reasonableness of the rule, the court said: "It cannot be denied that a rule of the company requiring these monthly payments to be made in advance would have been a reasonable rule, and that upon refusal so to pay service could be denied. The company must protect its plant and keep up its efficiency, and may enforce a rule that insures a reasonable revenue and its prompt receipt. It can maintain an efficient service only through prompt payment of its dues and tolls, and because of that fact it may use the summary remedy of denying service for non-payment. It cannot be said it may be denied the benefit of this rule because a patron claims the company is indebted to him. It cannot be required to stop and adjudicate claims held against it. The law compels it to furnish service; a patron may take service or not as he chooses. It must furnish efficient service to all alike who are alike situated, and must not discriminate in favor of or against any one. The law holds the company to these requirements strictly. For failure, the extraordinary remedies of mandamus and injunction may be invoked. It may be said that the courts

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are open to the company to collect its claims, but as to this the company and the patron are on an equal footing. The fact that the patron is solvent gives no aid in determining a rule which must apply to solvent and insolvent patrons alike. Keeping in view the nature of the company's duties and the service it may be compelled to render, it must be held that the company may enforce the payment of its current dues and tolls by the summary remedy of denying service regardless of the fact that the subscriber claims the company is indebted to him."

In regard to the point that the plaintiff was not indebted to the telephone company, the court says, quoting from the complaint: " 'The thing we complain of in this case is that the rule was unreasonably applied against the appellant; that under it the appellee refused appellant telephone service when he did not owe it a cent under the rule.' If a corporation authorized to establish and promulgate a rule as a condition to furnishing service has done so, and a patron is charged with notice of the rule and also of the fact that he has violated it, the corporation may refuse him service for such reason without informing him at the precise time of its refusal as to its reasons therefor."

In the case at bar, before service was denied to appellant, he was fully notified in advance that service would be denied him, and he was fully aware of the consequences of his refusal to pay.

On the question as to the partial enforcement of the rule the court in *Irvin* v. *Rushville, supra,* says: "The mere fact that appellee had not enforced its by-law against third persons before that time does not alone furnish a reason why it should not be revived against appellant. As before observed, for aught that appears in the complaint, he may have been fully apprised in advance of the consequences of his refusal to pay."

Again referring to the reasonableness of the action of the company, the court said: "Considering the *quasi* public functions of corporations like the one at bar—corporations whose

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first duty is to the public whom they serve—we think that their revenues should not be depleted by the furnishing of service to individuals who refuse to pay because they are asserting collateral demands."

The conclusion which the court reached on the demurrer was that the penalties sued for could not be recovered.

Lowry & Lamb, for appellee.

The difference between an action for simple breach of contract and an action against a party owing duty to the public, for breach of contract, by, or accompanied with, tort, is clearly drawn in *Railway Co.* v. *Hanes,* 69 Miss., 160.

That a telephone company is required to serve all members of the public alike, and is liable for compensatory damages for a negligent failure and to punitive damages for a willful failure to do so, is so well settled that it scarcely needs citation of authority. 25 Am. & Eng. Ency. Law (1st ed.), 747, 750, 775; *Telephone Co.* v. *Falley* (Ind.), 10 Am. St. Rep., 114. Besides, they are declared common carriers and liable as such by sec. 195 of our constitution.

A failure to give telephone connection, to replace the telephone on proper demand, and the taking out of a telephone over objection of the subscriber, would be subject to same damages as a railroad company is subject to for failure to carry freight. If such a failure is willful, the railroad company is liable in punitive damages. *Avingee* v. *Railroad Co.* (S. C.), 13 Am. St. Rep., 716.

It is not necessary that there should be direct testimony of willfulness, but if the circumstances in evidence are such that the jury might reasonably conclude that some of the elements for punitive damages were there, then the matter should be left to the jury under proper instructions. *Railroad Co.* v. *Harper,* 83 Miss., 561; *Railroad Co.* v. *Drummond,* 73 Miss., 813; *Railroad Co.* v. *Riley,* 68 Miss., 765; *Telegraph Co.* v. *Watson,* 82 Miss., 101; *Telegraph Co.* v. *Seed* (Ala.), 22 South. Rep.,

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474; *Telegraph Company* v. *Cunningham* (Ala.), 14 South. Rep., 579.

In the case of *Irvin* v. *Rushville Tel. Co.,* 161 Ind., 524, relied on by the appellant, while there are some points of similarity to the case here, there are also some striking differences, which take the pith out of the appellant's contention. In that case the subscriber was a stockholder in the company, and was held to know and be bound by its rules. It was a suit for statutory penalties, which are recoverable only when the patron should "comply or offer to comply with the reasonable regulations of the company." The demand set up against the claim for telephone rent was a set-off—an independent demand not "growing out of the relation of the parties as telephone company and patron."

TRULY, J., delivered the opinion of the court.

Under the facts of this case it was error to submit the question of exemplary damages to the consideration of the jury.

"It has been held in this state that punitive damages may be recovered only in cases where the acts complained of are characterized by malice, fraud, oppression, or willful wrong evincing a disregard of the rights of others. There must be some element of one or more of the qualities or properties named, relating to the acts made the ground of the action, before exemplary damages can be inflicted." *Railroad* v. *Marlett,* 78 Miss., 872 (29 South. Rep., 62). Accepting as true all the facts stated by appellee in reference to the removal of the telephone after his refusal to pay the agreed rental for the month which had just ended, none of the elements necessary to characterize the act as wanton, willful, oppressive, and malicious existed. It may be that the manager or other employe of the appellant misinterpreted the rules established by the company to be enforced in such contingencies; but if this be true, it would only authorize the recovery of compensatory damages, unless the actions of the employes were not only wrong, but committed with a knowl-

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edge of their wrongfulness. Every legal wrong entitles the party injured to recover damages sufficient to compensate for the injury inflicted, but not every legal wrong entitles the injured party to recover exemplary damages. Punitive damages are allowed not solely nor chiefly for the benefit of the particular individual injured, but are awarded on the well-established principle of law that they may have a deterrent effect and protect the general public against a repetition of similar offenses. The instructions of the court, considered as abstract propositions, are phrased with striking accuracy, but those authorizing the infliction of punitive damages are not applicable to the facts of the case presented.

We refrain from entering upon any discussion of the relative rights of telephone companies and patrons where, from atmospheric conditions, defective appliances, or other similar causes, inefficient and unsatisfactory service is rendered by the telephone companies. This is an important question, and we prefer to leave it until presented for necessary decision.

Reversed and remanded.

GEORGE R. ROOTES v. LENA S. THOMAS.

CHANCERY PRACTICE. *Striking answer from file. Defective affidavit. Leave to amend.*

Where an answer denied the equity of the bill, and was stricken from the files at a term of the court held before the expiration of the time for taking depositions in the case, because of technical defects in the affidavit to it, the defendant should have been granted leave to amend the affidavit, although not present in court and consequently did not ask for such leave.

FROM the chancery court of, second district, Tallahatchie county.

HON. JULIAN C. WILSON, Chancellor.

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Mrs. Thomas, the appellee, was the complainant in the court below; Rootes, the appellant, was defendant there. From a decree in favor of the complainant the defendant appealed to the supreme court.

Mrs. Thomas, then Mrs. McDowell, a young widow, promised to marry Mr. Rootes, but without giving him notice changed her mind and married one Penn Thomas. Notwithstanding her marriage to Thomas, she felt kindly toward Rootes and had great sympathy for him on account of his sufferings caused by the breach of promise of marriage. She formally executed and delivered to him a conveyance of the lands involved in this suit, claimed by him to have been a solace for his injuries. Shortly after the execution of the deed, however, Mrs. Thomas filed the bill in this cause, averring that the deed was executed at a time when she was mentally incapable of transacting business. She averred in her bill that at the time of the making of the deed she was addicted to the use of narcotics and was rendered thereby practically *non compos*. She averred in her bill that by the aid of medical treatment she had recovered her health and reason, and prayed that the deed executed to Rootes should be canceled. Rootes answered the bill and denied its equity. The bill, however, did not dispense with an oath to the answer, and defendant, Rootes, undertook to swear to the answer which he filed, and did so in the following words:

"STATE OF TENNESSEE, }
"COUNTY OF SHELBY. }

"George R. Rootes makes oath that he is the defendant in the foregoing answer, and that the matters and things therein set forth are true and correct, except as to such matters and things he states on information and belief, and those he believes to be true and correct.

F. M. MARLEY, *Notary Public*, Memphis, Shelby County, Tennessee.

"GEORGE R. ROOTES.

"F. M. MARLEY,
Notary Public."

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This answer was duly filed, and at a term of the court held within four months after the filing of the answer (the time allowed by statute, Code 1892, § 1760, for taking depositions), the same was stricken from the files on complainant's motion because of defects in the affidavit. Rootes was not present at this term of the court either in person or by solicitor. After the striking of the answer from the files, the court below sustained the complainant's motion for a *pro confesso,* and thereupon rendered a final decree in Mrs. Thomas' favor, adjudging the deed executed by her to Rootes void.

A. H. Murray, C. D. Harris, and *Harris, Powell & Harris,* for appellant.

The formal requisites of an affidavit are, first, title; second, venue; third, signature; fourth, jurat; fifth, authentication. 1 Ency. Plead. & Prac., 311.

The first requisite (title) sufficiently appears, because the title of the cause appears by direct reference made in said affidavit, which is as follows: "George R. Rootes makes oath that he is the defendant in the foregoing answer." 2 Cyc., 19, 20, note "C," and cases cited; 1 Ency. Plead. & Prac., 312, notes 1 and 2.

Second requisite: The venue shows the county and state in which the affidavit was taken, which affidavit in question appears as follows: "State of Tennessee, County of Shelby." 1 Ency. Plead. & Prac., 314, note 1; 2 Cyc., 21, note 2.

Third requisite: The signatures of George R. Rootes, affiant, and of the notary public before whom the affidavit was made, appear in the affidavit in question. 2 Cyc., 23, sec. 2, note 20; 1 Ency. Plead. & Prac., 315, sec. C, notes 1, 2, and 3.

Fourth requisite: The jurat is that part of an affidavit where the officer certifies it was made before him. It is no part of the affidavit proper. *Veal* v. *Perkerson,* 47 Ga., 92. On an indictment for perjury the jurat is not essential. *Rex* v. *Emden,* 9 East, 437. Omission from jurat of words "before me"

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is not fatal. *Cross* v. *People,* 10 Mich., 24. A paper purporting to be an affidavit will not be held defective because it does not appear to have a jurat. *Cleveland* v. *Stanley,* 13 Ind., 549.

"Where an injunction bill had been actually sworn to it was held that the injunction would not be dismissed because the master who took the affidavit had omitted to sign the jurat." *Capen* v. *Flemington,* 3 N. J. Eq., 467.

The legal presumptions are in favor of the validity of the affidavit. Certainly Marley, notary public, would not have signed his name and affixed his official seal to the affidavit without first having the affiant swear thereto. "Where an affidavit has been made and sworn to, and is correct in every respect except that a proper jurat is not annexed, such defects may usually be cured by amendment." 2 Cyc., 34, note 90. "Thus the officer who neglects to affix his signature to the jurat may be allowed to sign the same *nunc pro tunc.*" 2 Cyc., 34, note 91.

Fifth requisite: The jurat must be authenticated by the signature of the officer before whom the affidavit is made. 1 Ency. Plead. & Prac., 317, 318. The affidavit made to the answer was authenticated by the signature and seal of the officer before whom it was made. It is true the affidavit bears no date, but was made some time between the filing of the bill and the filing of the answer. "A date is not essential to an affidavit." 1 Ency. Plead. & Prac., 320, note F. "If an affidavit is untrue, perjury may be assigned upon it, though it bears no date or a wrong or impossible one." *Freas* v. *Jones,* 15 N. J. L., 20; 2 Cyc., 29, note E. Clerical errors will not vitiate affidavits. 1 Ency. Plead. & Prac., 321, note 4; *Schwartz* v. *Baird,* 100 Ala., 154.

As to the sufficiency of affidavits in general: *Trice* v. *Jones*, 52 Miss., 138; *Dunlap* v. *Clay,* 65 Miss., 454; 1 Ency. Plead. & Prac., 320, note 4; 2 Cyc., 27, 28, note 3.

Affidavits, if made in good faith and reasonably sufficient, should be held good.

The action of the court below in not allowing defendant at

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least a reasonable time to amend his answer or the affidavit thereto was without equity, and to summarily dismiss defendant's answer without notice or leave to amend, denied to him his day in court and a trial upon the merits; and for courts to sanction such would justly bring judicial proceeding into contempt.

McWillie & Thompson, and *S. R. Coleman*, for appellee.

Five things are vitally essential to the validity of an affidavit in all judicial proceedings—namely, first, where it was made; second, when it was made; third, by whom it was made; fourth, before whom the instrument was sworn to; fifth, to what suit or judicial proceeding, if any, it relates.

If the instrument shows these five ingredients, and each of them, it is what it purports to be—an affidavit; but if it lacks any one of the ingredients enumerated, it is not an affidavit, but an absolute nullity, and cannot be judicially entertained for any purpose without doing violence to an honest administration of public justice.

In regard to the first requisite—where was it sworn to?—this goes directly to the jurisdiction over the crime of perjury. The grand jury of one county has nothing to do with crimes committed in another. In the case of *Cook* v. *Straats*, 18 Barbour, 407, the supreme court of New York refused to entertain as an affidavit a paper purporting to have been sworn to before the commissioner of deeds of the city of Buffalo, because it had no venue showing the county in which the oath was administered.

There is nothing in the pretended affidavit to the answer in this case to show where the oath was made. The heading, "State of Tennessee, County of Shelby," simply shows where the recital of the making of the oath was written.

In regard to the second essential—when was the oath made? If perjury has been committed, this goes directly to the question of time within which a prosecution therefor may be lawfully

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instituted. There is nothing in the pretended affidavit in this case to show when the oath was made.

In regard to the third essential, it probably sufficiently appears that Rootes made the oath.

In regard to the fourth essential—before whom was it sworn to? If perjury was committed, this goes to the identity of the officer whose authority has been tampered with. There is nothing in the pretended affidavit to show that it was made before Marley. Marley simply signed his name to the writing; nothing to show that the oath was made before him, or before somebody else who was present with him, or that the witness was sworn even by Marley or anybody else. The courts generally refuse to entertain as an affidavit any paper from the jurat of which the words *"before me,"* or like words, have been omitted. The defect is not a mere irregularity, but is one of jurisdiction. It was said by Coleridge, justice, in *Queen* v. *Inhabitants of Bloxham,* 51 E. C. L., 526—a case specially commended to the court—that, although the objection may seem of but little importance, "if ever we are to use strictness, it should be on affidavits and all that relates to their forms." See *Smart* v. *Howe,* 3 Mich., 590; 1 Tidd's Practice, 494.

In regard to the fifth essential to an affidavit, we will make no comment, since it is generally held that an affidavit to a pleading may be referred back to the beginning of the pleading and be supported by its style, etc.

There is certainly nothing in the affidavit under consideration to show that the oath of Rootes was made before Marley, the notary public, and nothing except the seal to show the territorial jurisdiction of the notary. There is nothing to show where Rootes made the affidavit (the caption only fixes the place where the recital is made, that he makes oath, etc.), and consequently the venue of a prosecution for perjury cannot be ascertained. The notary simply signs the writing, without anything to show that he administered an oath to Rootes. *Barhydt* v. *Alexander,* 59 Mo. App., 188; *People* v. *DeCant,* 12 Hun. (N.

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Y.), 378; *Lane* v. *Morse,* 6 How. Pr. (N. Y.), 394; *Smith* v. *Richardson,* 1 Utah, 194; *United States* v. *Burr,* 25 Fed. Cas., No. 14,692c.

While there are authorities seemingly to the contrary, yet the great majority, if not all, of them relate to affidavits made within the jurisdiction of the court in which they were sought to be used, and they are upheld simply on the ground that the court took judicial knowledge of the existence and qualification of the officer having authority to administer oaths within the particular judicial district in which the officer resided and had authority. See generally, on the subject of affidavits, 2 Cyc., 26 to 29; Fletcher's Eq. Pl. & Pr., 464 to 465.

The case of *Trice* v. *Jones,* 52 Miss., 138, is not in conflict with the above authorities nor with our position in this case. It cannot be ascertained from the report what the body of the affidavit there under review contained, and we can easily conceive of a case where the conclusion, "Given under my hand and seal," would be entirely sufficient. We would have such a case where the body of the affidavit showed that the affidavit was sworn to before the officer.

WHITFIELD, C. J., delivered the opinion of the court.

It was manifest error not to allow the amendment of the jurat, if it should be conceded that it needed amendment.

The decree pro confesso is set aside; the cause is reversed and remanded, to be proceeded with in accordance with this opinion.

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TUNICA COUNTY v. THADDEUS N. RHODES.

1. **SCHOOL FUNDS.** *Warrants. School directors. Orders. Code* 1871, § 2024.

   Under Code 1871, § 2024, providing that the county treasurer shall not pay warrants drawn on school moneys unless they have been issued by order of the board of school directors, it is necessary to sustain a warrant issued thereunder, alleged to have been drawn pursuant to a lost order of the board, to prove not only that an order for the warrant had existed, but its contents as well.

2. **SAME.** *Specification of use. Code* 1871, § 2025. *Mandamus.*

   Under Code 1871, § 2025, providing that all orders upon the county treasurer for the payment of school moneys shall specify not only the fund upon which they were drawn, but the specific use to which the money was to be applied, school warrants issued thereunder which fail to specify the specific use to which the money was to be applied are void, and mandamus will not lie to enforce the levy of a tax for their payment.

FROM the circuit court of Tunica county.

HON. SAMUEL C. COOK, Judge.

Rhodes, the appellee, was plaintiff, and Tunica county, the appellant, defendant in the court below. From a judgment in plaintiff's favor the defendant appealed to the supreme court.

The suit was begun by a petition filed in the circuit court of Tunica county by appellee against appellant for a mandamus to compel appellant to levy a tax on the taxable property of said county for the payment of a number of warrants owned by him, issued to the county treasurer of said county, signed by the president and countersigned by the secretary of the board of school directors, at divers times between June 15, 1872, and April 18, 1873. The following is a copy of one of them, the others conforming to same form: "No. 181. The State of Mississippi. The board of school directors of Tunica county. Austin, Miss., June 15th, 1872. To the county treasurer: Pay

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to G. W. Merriman, or order, $50.00 allowed by the above board from the school fund, in subdistrict number eight (8), and for so doing this shall be your warrant. ($50.00.) [Countersigned] C. W. Dunaway, secretary, by J. E. Deering, D. S. [Signed] Edward Carter, president. [Indorsed on back] G. W. Merriman." The case was tried before the judge, a jury being waived.

On the question as to whether the warrants had been issued by the board of school directors, the appellee showed the following facts: (1) The existence of the board of school directors. (2) That those who signed the warrants held the official positions recited in the warrants; that their signatures were genuine; that the board of school directors had a warrant book, filled originally with printed school warrants, containing blanks for dates, amounts, funds, numbers of subdistricts, and for the signatures of the president and secretary; that this book also contained stubs to correspond with the warrants; that a great number of school warrants were issued from the warrant book, the first being dated April 8, 1871, and the last June 14, 1873; that all the stubs in said warrant book, corresponding to the warrants issued therefrom, were filled out; that the warrants in this suit were issued from this book, and tallied with the stubs, having the same dates, payees, and amounts, and being upon the same fund, and that the payees in said warrants receipted for the same on said stubs; that the county treasurer had made settlements with the board of school directors, showing that he had paid a great number of the warrants issued from said warrant book, some of them having been issued during the time covered by the warrants sued on, and that the actions and settlements of the treasurer were approved by the board of school directors; that the payees in the warrants were teachers at the time they were issued; that the board of school directors kept a record of their allowances and proceedings, which was lost, and diligent search had been made for it by the proper parties.

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F. A. Montgomery, and *J. N. Flowers,* assistant attorney-general, for appellant.

Perkins & Winston, for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

Code 1871, § 2025, provides for four distinct funds—a schoolhouse fund, a teachers' fund, a school-land fund, and a state school fund. There was no such fund known to the law as a school fund. The schoolhouse fund was to be used to pay for schoolhouse purposes and contingent expenses. The teachers' fund was to be used to pay the salaries of teachers. The same section provides "that all orders upon the treasurer for the payment of school moneys should specify not only the fund upon which drawn, but the specific use to which the money was to be applied." None of these warrants specified the specific use to which the money was to be applied. It was not enough to name the fund out of which the money was to be paid, but it was also essential that the order and the warrant should both specify the use to which the money was to be applied. There is nothing in the warrant to show whether the money was used for the payment of teachers' salaries, for the *per diem* of the director's, for the superintendent's salary, or for the building of a house. A house could be built by money from the teachers' fund. The purpose of the law was to require, as a legal voucher, a warrant on its face evidencing the specific use to which the money was to be applied, and without this the warrant was a nullity.

Counsel for appellee insists that the words "specific use" mean "subdistrict," and he cites *Jarvis* v. *Warren County,* 49 Miss., 603. But he misapprehends that case. The purpose of the opinion there was to show that each subdistrict must bear its own burden, and incidentally, as flowing from this, that a warrant could not show the specific use without showing the subdistrict for whose benefit the money was to be used. But this

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is far from showing that it was enough for the warrant to show merely that it was drawn on a certain fund of one of the sub-districts. It must have gone beyond that and shown the specific use to which the money was to be applied. The treasurer was to act as a check on the board of school directors, and the statute required him to know whether the claim the warrant was to pay constituted a legitimate charge against the fund on which it was drawn; and the warrant itself was required by the law to be thus drawn, specifying the specific use to which the money was to be applied, that it might, on its face, furnish the treasurer with the facts showing that it was a legitimate warrant. As well said by counsel for appellant: "The treasurer could do this same thing in passing upon warrants issued by the chancery clerk upon allowances by the chancery and circuit courts and the board of supervisors. For much stronger reasons he was to deal in this way with warrants of this subordinate board."

There is a second objection to the affirmance of this judgment. Code 1871, § 2024, expressly recites that the treasurer shall not pay these warrants unless they have been "issued by order of the board" of school directors. These orders are not produced in this case. It seems they cannot be. It was therefore necessary to prove their contents, in order that it might be seen whether the orders themselves were valid judgments, conforming strictly to the requirements of the law. It was not enough for appellee to show that there had been orders made—that is to say, that orders had existed—but the precise thing essential for appellee to show in this connection was the contents of the orders. Without protracting this opinion by extended comment on the evidence, it is enough to say that the evidence on this point falls far short of such showing as the nature of the case requires.

It follows that the judgment is reversed and the suit dismissed.

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JAMES N. HORN ET AL. v. JOHN J. D. BEATTY.

1. LACHES. *Cancellation of deeds. Duress.*

A complainant in a bill to cancel a conveyance for alleged fraud and duress who delays bringing the proceeding for nearly seven years after the date of the instrument, and who receives in the meantime four annual payments of the purchase money, is barred by laches.

2. SAME. *Case.*

A decree canceling a conveyance for fraud and duress is not justified by evidence showing that two years after complainant acquired the half interest in the property constituting the subject of the conveyance and seventeen years before the filing of the bill, a mineral deposit of alleged medicinal value was discovered on the land, that during several years three different agencies attempted to exploit the sale of the mineral, but failed, and that it was not until long after complainant had conveyed his half interest to his partner, under a proposition to buy or sell at a given price, that the mineral was found to be valuable.

FROM the chancery court of Newton county.

HON. JAMES F. McCOOL, Chancellor.

Beatty, appellee, was complainant, and Horn and another, appellants, were defendants in the court below. From a decree in complainant's favor defendants appealed to the supreme court. The opinion states the facts of the case.

S. A. Witherspoon, and *Thomas Keeth,* for appellants.

The alleged fraud and duress were not proved, and the proceeding was barred by the laches of the complainant. *Davis* v. *Railroad Co.,* 46 Miss., 552; 10 Am. & Eng. Ency. Law (2d ed.), 337.

J. R. Byrd, for appellee.

The evidence fully sustained the charges of fraud and duress set out in the bill. The value of the mineral was fraudulently concealed by J. K. Horn, who thus secured a sale by his partner,

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the complainant, at an outrageously inadequate price. 2 Pom. Eq. Jur., 902, 909, 927, 928. No objection was made to the testimony of complainant in the court below on the ground that it was in his own behalf and against the estate of a deceased person. It cannot be made for the first time in this court. *Jones* v. *Loggins,* 37 Miss., 546.

CALHOON, J., delivered the opinion of the court.

This is a bill filed in September, 1901, to cancel certain instruments, and for an account, and for the appointment of a receiver, because of fraud and duress. A demurrer to it was by the court overruled, and answer made, proof taken, and decree final for Mr. Beatty, the complainant below.

The pith of the whole matter is this: In 1882 Beatty got a conveyance from one J. K. Horn of an undivided one-half interest in a twelve-acre tract of land which was thought suitable for a gin and mill site, and the two proceeded to erect a proper building, and to install in it the necessary machinery, and to apply the power, and to operate the plant. Being doubtful of J. K. Horn's title, Beatty returned his conveyance, and received another executed by J. K. Horn and his wife, Sarah E. Horn, who is one of the appellants here, which conveyance is of date December 28, 1883. The plant was worked by J. K. Horn and Beatty with harmony and success for ten years, when J. K. Horn substituted the services of his son, J. N. Horn, the other appellant here, who, in 1893 or 1894, had some disagreement with Beatty about the trifling sum of ten dollars in current partnership distribution of earnings. This disagreement, as will be seen, was the real or ostensible beginning of a series of events which led up to a dissolution of the partnership, and a conveyance of February 4, 1895, by Beatty to the appellant, Mrs. Sarah E. Horn, who is the widow of the said J. K. Horn, who died January 2d of the same year, 1895. It is this conveyance of his which Beatty seeks to have canceled because procured by fraud and duress; and unless it was procured by fraud

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or duress, Mr. Beatty has no case. If it was so procured, he must prevail, unless prevented by his own subsequent conduct or laches; and this sentence presents all the contentions of the parties to this litigation. The evidence, direct and circumstantial, preponderates against the charge of duress. But if it be the reverse, the appellee cannot avail of it, because, by his acceptance of the fruits of the contract and his long delay in making any utterance or doing any act in repudiation of his conveyance, the law presumes his ratification of it. On this we are content to rest on the text and notes in 10 Am. & Eng. Ency. Law (2d ed.), pp. 337, 338. It there appears that he who seeks to avoid a contract obtained by duress "must move promptly, and not sleep on his right," and a delay of three years was held sufficient to ratify a deed. In the case at bar the delay was from 1894 to 1901, about seven years, with the further pregnant fact that Beatty in the meantime accepted, without objection or protest, and when there was no pretense of duress, four annual payments, including the final payment of the purchase price, being the annual payments made in 1894, 1895, 1896, and 1897. We dispose of the charge of fraud by simply saying that from his own testimony Mr. Beatty shows plainly that fraud, if there was any, had nothing whatever to do with his execution of the deed to Mrs. Horn. It was the alleged duress alone, if anything wrong at all, which affected him, as is plain from his own statement as a witness. Mr. Beatty's bill was filed September 13, 1901. Seventeen years before then—in 1884—and two years after he became owner of the half interest in the twelve acres, he himself discovered what appeared to be a mineral deposit on it. This deposit developed into what is called "acid iron earth," claimed now to be a wonderful remedy for human ailments. It was only after there appeared to be money in it, after many years of exploitation by Horn and advertisement through three different agencies, that Mr. Beatty filed his bill claiming to be the victim of concealed fraud and duress. From the history of the matter as set forth in the bill,

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it would seem incredible that any sane man, in any degree alive to his own interest and to current matters of concern, could have been ignorant of the probable or possible value of the stuff. The evidence thoroughly satisfies us that no fraud or concealment, if any there was, had any sort of influence in obtaining from him his deed in 1895. In fact, while the bill charges fraud and concealment, it is not charged that they operated to induce the execution of the deed, but that act is averred to be the result of fear of personal violence. In our view of the evidence, no fraud was practiced. Certain it is that it had no effect, and certain it is that the Horns made no effort to buy from Beatty for more than ten years after he discovered the mineral; and then, according to the disinterested testimony, the offer by them to Beatty was to buy or sell at a price stated, and he concluded to sell. Nobody appears who ever heard of Beatty complaining of fraud or duress until the stuff appeared to have value. The truth is, we think, he knew as much of the value of the deposit as the Horns knew. It was all quite problematical. He knew that many thought it of no value, and that some thought it of considerable worth. Barber thought it valuable, and told Beatty so. It was so thought by a druggist in a neighboring town, to whom Horn and Beatty took a sample, and so pronounced by an expert at St. Louis; all depending on expensive exploitation. Beatty knew that Williams had been interested to exploit it, and that he failed after incurring large expense. After he made the deed he knew that two other men were successively interested with the same object, but he said not a word of fraud or duress until the last of these agents had good promise of success.

It would too much protract this opinion to elaborately detail the facts, nor do we consider the propriety of the action in overruling the demurrer to the bill. We look back over the record, and are thoroughly satisfied on the facts that Mr. Beatty should not prevail.

Reversed, and decree here dismissing the bill.

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BOARD OF LEVEE COMMISSIONERS OF YAZOO-MISSISSIPPI DELTA v. JAMES LEE.

1. **EMINENT DOMAIN.** *Levee damages.*
   A judgment for damages for land taken and damaged for levee purposes will not be disturbed on the ground that it is excessive, when a judgment for a much larger sum might have been given under the evidence.

2. **SAME.** *Harmless error.*
   The fact that one witness who testified favorably for the defendant was incompetent affords no ground for setting aside a judgment awarding defendant a certain sum as damages on condemnation of his land for levee purposes, when the judgment is fully sustained by competent evidence.

3. **SAME.** *Evidence. Use to which land is applied. Steamboat landing.*
   Evidence of the value of the land in question as a steamboat landing is competent in a proceeding to condemn land for levee purposes.

FROM the circuit court of, first district, Coahoma county.

HON. EARL BREWER, Special Judge.

Condemnation proceedings by the board of levee commissioners of the Yazoo-Mississippi Delta against James Lee. From the judgment rendered by the circuit court petitioner appealed to the supreme court.

The appraisers to assess levee damages for Coahoma county made an award of $500 in favor of appellee, and from that award both parties appealed to the circuit court, and from a verdict and judgment for appellee for $660 for the land, and damages to land not taken, $275, and $239.20 interest, aggregating $1,174.90, this appeal is prosecuted by appellant. The evidence showed that the land taken was a narrow strip lying adjacent to and parallel with the line of the existing levee, extending in a north and south direction. Appellee was the owner of another strip of land, lying between the land appro-

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priated and the river front, and fronting on the river, and a portion of this land was used by appellee as a steamboat landing, and a warehouse was erected thereon for the purpose of storing freight. Appellee owned three or four acres, which were not taken; and defendant was permitted, over objections of plaintiff, to prove that the strip of land taken had a special value because appellee was operating a steamboat landing on the part not taken. T. F. Logan testified that the land taken was worth $800 per acre, and the damage done to the land not taken was $1,200 to $1,500 as the borrow pits dug in the land taken were deep, and caused the land to cave into the river. A. T. Jones testified that the landing was a fairly good one, and there was no landing place north of the Lee Line Landing for three miles, and none south, except the Kate Adams Landing, for five miles. J. L. Williams, a witness for appellee, was permitted to testify as to what, in his opinion, the value of the land was, considered as a steamboat landing. This evidence was objected to because Mr. Williams did not pretend that he was an expert or that he was ever engaged in the business of steamboat landing keeper, but was a farmer, living away from the river front.

D. A. Scott, for the appellant.

Filed a brief on the facts, discussing the questions decided in the opinion of the court.

J. A. Glover, for the appellee.

Filed a brief on the points disclosed by the court's opinion, and cited the following authorities: *Boom Co.* v. *Patterson,* 98 U. S. (L. ed.), 208; *In re Furnham* v. *St. Brooklyn,* 17 Wendel (N. Y.), 670; *Brown* v. *Railroad Co.,* 64 Miss., 479; 6 Am. & Eng. Ency. Law (1st ed.), 618, 622; 14 *Ib.,* 256; 10 *Ib.* (2d ed.), 1170; *Richardson & May* v. *Levee Board,* 68 Miss., 539; *Dillard & Coffin* v. *Levee Board,* 76 *Ib.,* 641.

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WHITFIELD, C. J., delivered the opinion of the court.

It was competent to receive evidence showing the special value of the land as a steamboat landing, and there were at least two witnesses who were experts on this subject—T. F. Logan, who has been in the wharf-boat business for about thirty-five years as a steamboat landing keeper, and for eight or ten years in the employ of Capt. Lee himself; the other witness, Arthur T. Jones, has been a pilot on the Mississippi river for twelve years. The testimony of these witnesses, and of other witnesses besides Williams, overwhelmingly establishes the plaintiff's case. According to the testimony of Mr. Logan the damage might have amounted to $3,420. It is unnecessary to go into details showing the borrow pits to be eleven feet deep, and that no other steamboat landing, except that of the James Lee and the Kate Adams, existed for miles on the Mississippi river; as to having to ferry the freight across the borrow pits from the landing; and as to the seeping of the water from the borrow pits, causing the caving of the banks next to the river, etc. The verdict of the jury is for less than half of what it might have been, according to the competent testimony. If the testimony of Williams was incompetent, no other result could reasonably have followed. We think the testimony makes it perfectly plain that the land taken should be treated as a part of the land needed for the appropriate and necessary uses of a steamboat landing.

Judgment affirmed.

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THOMAS BROWN *v.* STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Murder. Previous difficulty. Evidence.*
   Where on the trial of a murder case the state designedly proved a previous difficulty between deceased and the accused, it was error to deny defendant the right to show the details of such difficulty.

2. SAME. *Supreme court practice.*
   In such case, upon appeal, the state cannot claim that the error is non-prejudicial because the record fails to show what the details of the previous difficulty were, where it does show that defendant was not permitted to state to the trial court, even out of the hearing of the jury, what he expected to prove touching the details.

FROM the circuit court of, first district, Carroll county.

HON. WILLIAM F. STEVENS, Judge.

Brown, the appellant, was indicted, tried, and convicted of the murder of one Murdee Williams and sentenced to death, from which conviction and sentence he appealed to the supreme court. The facts of the case upon which the decision turned are sufficiently apparent from the opinion of the court. The homicide occurred in Montgomery county, but a change of venue was granted, on defendant's application, to the first district of Carroll county. The case was once before in the supreme court, then involving the question of change of venue, and it is reported—*Brown* v. *State,* 83 Miss., 645.

George A. McLean, and *Patrick Luter,* for appellant.

Proof of previous difficulties is settled law in this state, and is always admissible in evidence where anything that can fairly be construed as an act towards the commission of a dangerous assault can be shown to have been done by the person slain, and that, if there be even a doubt as to whether such act was done, then evidence of previous difficulties should be admitted. *Hawthorne* v. *State,* 61 Miss., 749; *Guice* v. *State,* 60 Miss., 714;

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Holly v. *State,* 55 Miss., 424; *Kendrick* v. *State,* 55 Miss., 448; *Spivey* v. *State,* 58 Miss., 864; *Foster* v. *State,* 70 Miss., 755.

The facts in this case show that it is one of those rare and exceptional cases in which it was proper to show a former difficulty, and the court should have permitted proof of the difficulty.

The purpose of threats or previous difficulties is to throw light upon a transaction subsequently occurring, and the man who is the aggressor in other difficulties, it is common sense to presume that in the last, or fatal rencounter, he was also the aggressor.

The court erred in permitting counsel for the state to introduce the fact of a previous difficulty and refusing to permit defendant's counsel to show the facts of the occurrence. The court permitted this over the objection of counsel for the defendant, and this is clearly condemned in *Foster* v. *State,* 75 Miss., 745.

J. N. Flowers, assistant attorney-general, for appellee.

The single proposition in this case which is urged by counsel for appellant is that the court erred in refusing to permit the details of the alleged prior difficulties to be shown by the defendant. But there are several answers to this contention of counsel.

From the facts of the two difficulties which occurred on the night of the killing, the fatal one and that just before it, as told by Thompson and by the accused, it does not appear that the two negro women, sought to be brought into this case, were involved in any way. The accused himself tells how this difficulty came up, and he does not say that the names of the women were mentioned or that their presence in the neighborhood had anything to do with the difficulty. If he had said that the deceased was only driving him away from the building in which the two women were at the time, and that this was the provocation, it might have been competent, if the evidence had been offered in the regular way, to show that on former occasions he had beaten

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him away from the presence of these women. But the accused, by his own story, attempts in no way to connect the women with the difficulty, but shows himself what was said, and how one word brought on another until the crisis was reached.

If it is true that on former occasions Williams, the deceased, had fought Brown away from these women, it is necessarily true that Brown was contending with Williams for the favor of these same women, and it only amounts to saying that they were rivals and that their interests were continually conflicting. The fact that they had fought about these women before would not justify a second fight, nor would it excuse the killing on this occasion, when the immediate facts of the fatal difficulty are in evidence.

Under no view of the case was it competent for the defendant himself to show the former difficulties or the details thereof. The court told him that he could show there had been previous difficulties, but that he could not show the details of these previous difficulties. He declined to offer that part which the court held to be competent unless he should be permitted to introduce all the evidence that he desired to offer. What he desired to offer nowhere appears.

But above and beyond all these criticisms of this part of the record of the trial stands one other conclusive fact, and that is that counsel for defendant did not think enough of the contention, which they now urge here, to dictate into the record what it was proposed to show as to these women and as to the former difficulties. The questions only are given. The answers to the questions are not given, and it does not appear what these answers would have been. As far as this record shows, if the court had permitted Brown to answer the questions propounded, he would have said that the women had nothing to do with the former difficulties or with the one which ended fatally.

WHITFIELD, C. J., delivered the opinion of the court.

Under the peculiar circumstances of this case, as disclosed in this record, it was fatal error to refuse to allow the defendant to

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show on cross-examination of Scott Thompson, introduced by the state in rebuttal, the details of the previous difficulty. The state itself had shown on the cross-examination of the defendant himself that there had been a previous difficulty. The first questions asked by the state on this cross-examination disclose this fact. The case of *Foster* v. *State,* 70 Miss., 755 (12 South. Rep., 822), is conclusive of the proposition that, where the state itself introduces the previous difficulty, the defendant should be permitted to show the details and character of such difficulty. It is urged for the state that the assignment of error cannot prevail, because the record does not show what the details of the previous difficulties were—neither that occurring some two weeks before the killing nor that occurring at a longer period—and authorities are cited to sustain this contention. But the complete answer, on this particular record, is that the counsel for the defendant did all in his power to state to the court, when the jury were retired, what these details were, but the court responded "that he did not know and did not care what the counsel was going to ask the witness." When the counsel is not permitted by the court to state, even to the court, whilst the jury are retired and the competency of the testimony is under examination by the court, what the character and details of a previous difficulty are, the state cannot be heard to say here that a defendant shall not have the benefit of an assignment of error predicated on the refusal of the court to permit him to prove the details of a previous difficulty, the state itself having proved that there was such a difficulty. The record in this case, we may add, makes it perfectly plain that the justice of the case required, after the state had been permitted to prove that such difficulty had occurred, that the defendant should be allowed to show the details of the difficulty, in order to demonstrate who was the aggressor in the difficulty resulting in the killing.

Reversed and remanded.

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MERIDIAN WATERWORKS COMPANY *v.* CITY OF MERIDIAN.

1. MUNICIPALITIES. *Contracts. Water supply. Estoppel. Laws* 1886, *ch.* 325, *p.* 589. *Rescission of contract.*

   Where a city, acting under a statute (Laws 1886, ch. 325, p. 589), empowering it to contract alone for pure and wholesome water, contracted with a water company for a supply of such water, it is not estopped to complain:

   (*a*) That the specific water furnished by the company after its plant had been put in operation was not pure and wholesome, although, pending the negotiations which led to the contract, the city accepted samples of the water which the company proposed to furnish, and the water furnished was like the samples; nor

   (*b*) That the water company used a reservoir from which the city was furnished impure and unwholesome water, although the contract contemplated that the water should be furnished from a reservoir of the kind so used.

2. SAME. *Pure and wholesome water.*

   A contract requiring the party contracted with to furnish "pure and wholesome water" certainly required the water to be furnished to be reasonably pure and wholesome, whether it was required to be perfectly pure or not.

3. SAME. *Fire protection.*

   Where a contract to supply a city with water required the party contracted with to furnish first-class fire protection, the fact that the different sizes of pipe that might be used in constructing the plant were mentioned in the contract did not limit the obligation of the party contracted with to furnish first-class fire protection, nor preclude the city from complaining that the pipes actually laid in pursuance of the contract did not afford first-class protection.

4. SAME. *Extensions of plant.*

   Where a city had instituted proceedings to cancel a contract with a water company, the former's act in allowing or even in ordering additions and improvements to be made after suit was brought did not estop it from prosecuting the proceedings; but the water company, in making improvements with notice of the pendency of the proceedings, acted as a volunteer.

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FROM the chancery court of Lauderdale county.

HON. STONE DEAVOURS, Chancellor.

The city of Meridian, the appellee, was the complainant, and the Meridian Waterworks Company, the appellant, the defendant in the court below. From a decree in complainant's favor the defendant appealed to the supreme court. The facts are stated in the opinion of the court.

A. S. Bozeman, Brown & Spurlock, and *G. Q.* and *W. M. Hall,* for appellant.

Miller & Baskin, Ethridge & McBeath, and *S. A. Witherspoon,* for appellee.

[The briefs in this case on both sides were able, exceedingly elaborate, and full. Their very great length, however, precludes the reporter from making any synopsis which would do them justice.]

BLOUNT,* Special Judge, delivered the opinion of the court.

Bill filed in chancery court of Lauderdale county by the authorities of the city of Meridian asking a decree of forfeiture and a judgment annulling a contract entered into by the mayor and boards of aldermen and city council of said city with the Meridian Waterworks Company, under which contract said company had been operating for about twelve years. The bill alleged continued failures to furnish pure and wholesome water and fire protection, such as called for in the contract. The answer denied the breaches, and set up other defenses referred to hereafter. After prolonged continuances, running for about four years, and after taking a superabundance of testimony, much of which was immaterial, the case was finally tried by the chancellor, and a decree entered cancelling the contract. From this decree the defendant waterworks company prosecutes an appeal.

*JUDGE CALHOON having recused himself in this case, I. T. BLOUNT, ESQ., a member of the Supreme Court bar, was appointed and presided in the cause in his place.

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By act of the legislature of 1886, p. 589, ch. 325, amending the charter of the city of Meridian, authority was given the city boards "to enter into contract with any person or company for the supply of a sufficient amount of pure and wholesome water to the people of said city." By ordinance adopted July 20, 1886, which ordinance constitutes the contract in this case, "William S. Kuhn, his associates, heirs, legal representatives, and assigns," were authorized, "under the conditions, obligations, covenants, and agreements, subject to the rights of purchase and liability of forfeiture hereinafter provided for, to construct, maintain, own, and operate waterworks in the city of Meridian." This contract, afterwards by an agreement properly entered into and made of record, was transferred to and assumed by appellant, the Meridian Waterworks Company, an incorporation chartered under the state laws. The act of the legislature authorizing this contract expressly required that "a sufficient supply of pure and wholesome water should be furnished the people of Meridian," and that such contract for such water supply "shall be guarded and carefully drawn so as to secure the city in the performance of the same. . . . But no private company shall have the right to lay water mains along the streets of the city without first obtaining the right of way from the city authorities; and the right of way shall be granted only upon condition that such person, company, or corporation shall furnish an abundant supply of pure and wholesome water, and at reasonable rates." Acts 1886, p. 591, ch. 325, sec. 3. The city authorities had no power to contract for anything less than this, and the waterworks company, having undertaken by its contract to furnish the people of Meridian with pure and wholesome water and in sufficient quantities, could not fulfill its obligations without giving the results contemplated by the law and called for in the contract made under this law. The contract was a continuing one, and was to run "twenty-five years," or until annulled "by purchase or forfeiture," and the obligations to carry out this contract were mutual. The conten-

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tion is made by appellant that it fully complied with the provisions of the contract as to the quality of the water by procuring within the thirty days allowed by the ordinance samples of the water to be furnished, which was satisfactory to the city boards, and which was accepted by them, and that this is the water which is still being furnished. The contention is also made that the contract contemplated that the water should be furnished through reservoirs (which at the time the contract was made had not been built), just as it was being furnished at the date of the filing of the bill in this case; hence the city is estopped from complaining either against the specific water or the manner in which it is furnished. We cannot accept either proposition as correct. Clearly, the lawmakers contemplated that "pure and wholesome water should be furnished in sufficient quantities," and the city authorities contracted for results, not for the then conditions. Admitting that the specific water, samples of which, on presentation to the city boards, were accepted by them, and declared to be satisfactory, surely this should not be held to preclude a complaint against the company if afterwards this identical water—that is, water from the identical source—was furnished to the people of Meridian in an unwholesome or impure state. The source from which the water originally comes might remain uncontaminated, but the question governing here is, Was the water, when delivered to the consumer, "pure and wholesome?" The city's contract called for "pure and wholesome water in sufficient quantities to supply the people for drinking, domestic, and culinary purposes and for first-class fire protection." As was well said by the learned chancellor in his findings in the court below: "To determine whether water is pure and wholesome and suitable for drinking purposes, it is not necessary to weigh with tenderness and care the testimony of experts; an ordinary mortal knows whether water is fit to drink and use." Nor are we called upon to hold that water, to be wholesome, must be perfectly pure. It must, how-

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ever, be reasonably pure and wholesome to comply with a contract of this nature.

The finding of the court below as to the failure to furnish "first-class fire protection" is approved. Again, we say, results, and not particular sized pipes, were the matters in contemplation when the contract was made. The naming in the contract of the different sizes of pipe that might be used in constructing the plant did not in the least diminish or limit the liability of appellant to furnish "first-class fire protection." If it could do this with less than a 12-inch pipe (the largest size contracted for), well and good; but if first-class fire protection could not be given, within the territory covered by the contract, with less than a 12-inch pipe, the waterworks company was under obligation to furnish mains of the largest size called for in the contract, and was in default if it did not do so, if on this account "first-class fire protection" was not given. The city authorities were not required to look after the size of the water pipes. The city could rely on the promise of the waterworks company to perform the stipulations of its contract. *Light, Heat & Water Co.* v. *City of Jackson*, 73 Miss., 598 (19 South. Rep., 771).

We find nothing in the contention that a waiver amounting to an estoppel grows out of the city authorities allowing, or even ordering, additions and improvements to be made after suit was brought. If there had been no agreement concerning this matter, appellant had full notice of the pendency of the proceedings to cancel the contract, and any improvement made thereafter could not be pleaded or taken advantage of to defeat an accrued right, or as an atonement for wrongs committed prior to the institution of the suit then pending. As to the extensions and improvements made after suit was brought, appellant was a volunteer.

The testimony on all the material matters involved in this case was conflicting. The chancellor, as was his province, found the facts in favor of the complainant, and we are not prepared to disagree with him. Reluctant as the courts are to

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annul and declare contracts forfeited, we are of the opinion that the case under discussion falls squarely within the rule laid down in *Farmers' Loan & Trust Co.* v. *Galesburg,* 133 U. S., 156 (10 Sup. Ct., 316; 33 L. ed., 573), cited with approval by this court in *Light, Heat & Water Co.* v. *City of Jackson,* 73 Miss., 598 (19 South. Rep., 771), and that we should not disturb the finding of the court below.

Affirmed.

SUGGESTION OF ERROR.

After the delivery of the foregoing opinion, *Tim E. Cooper,* for appellant, filed an elaborate suggestion of error, but it was

Overruled.

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YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY *v.* CHARLES J. SEARLES.

1. **TRUSTS AND COMBINES.** *Code* 1892, § 4437. *Laws* 1900, *ch.* 88, *p.* 125. *Contracts. Construction.*

   In determining whether a contract violates public policy as evidenced by the anti-trust statutes (Code 1892, § 4437; Laws 1900, ch. 88, p. 125), the courts will consider the nature of the business contemplated and the tendency of the contract as affecting the public, rather than the nature of the parties, whether corporations or individuals.

2. **SAME.** *Test of a trust.*

   All combinations or contracts, without regard to their purpose, intent, or effect, by which the control of business is placed within the power of trustees or persons other than the contracting parties, are not trusts within the meaning of the statute, Code 1892, § 4437, Laws 1900, ch. 88, p. 125, defining trusts and prohibiting contracts in restraint of trade, but the test of a trust and the essential of its existence is that the contract or combination be on account of its actual results obnoxious to public policy, or be in itself and in its necessary effect inimical to the public welfare.

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3. SAME. *Forms not controlling.*

Courts will look through the form of an association in order to ascertain its character, and will judge of its nature not merely by its promulgated rules, but by its actual operation, and will decide the question of its legality or illegality according to the true nature and probable effect of the arrangement, without special regard to the form which has been assumed in the particular instance.

4. SAME. *Rules.*

If the form of a combination is legal, and its aim and purposes such as the law will uphold, it will not be denounced as illegal from the fact alone that the objects for which it was entered into are occasionally effectuated by rules which are only invoked as it becomes necessary to cope with unforeseen contingencies as they arise.

5. SAME. *Practical operation.*

Where a contract or understanding is not of itself inimical to the public welfare or in contravention of express statute, it will be upheld unless it is so operated as to become oppressive by infringing upon the rights of private individuals, or unless it works to the detriment of the general public.

6. SAME. *Car service associations. Failure to pay. No service.*

A rule of a car service association, providing that where consignees refuse to pay, or unneccessarily defer settlement of, car service charges, cars will not be switched to the private sidings of such persons, but deliveries will only be made on public delivery tracks of the company, is legal and enforceable.

7. SAME. *Refusal to pay. Unadjusted claim.*

The fact that a consignee has an unadjusted claim for damages against a railroad is no valid excuse for his refusal to pay demurrage on cars unduly detained by him.

8. SAME. *Reasonable orders. Wrongful enforcement.*

Where an order of a car service association is reasonable in its general tenor and effect, the question whether it was rightfully invoked in a particular instance does not affect the question of whether the association is or is not a trust or combine.

9. SAME. *Railroads. Extra services. Extra charges.*

Railroads are entitled to charge and receive extra compensation for extra service rendered after the arrival of freight at its destination, such as reconsignment charges, car service or switching charges, demurrage, and the like.

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Syllabus.

10. SAME. *Lawful agreement. Unlawful use.*

An agreement, lawful in its character and purpose, is not rendered unlawful because some of its members attempt to put it to an unlawful use.

11. SAME. *Facts considered. Course pursued not arbitrary.*

A rule of the railroad commission forbids railroads to discriminate in demurrage rates, and requires them to collect demurrage at all places on their lines if they collect at any place. The operation of the rule is to be suspended by the commission when justice demands. Other rules of the commission regulate car service associations. Prior to the promulgation of the latter set of rules, a car service association had a rule providing for the withdrawal of service on private sidings in case of the failure of consignees to promptly settle bills for car service charges. Under these rules, where a consignee refused to recognize the car service association, and refused to pay car service or demurrage, the withdrawal of car service on his siding by the car service association did not constitute such oppressive and arbitrary action as to constitute the car service association an illegal trust and combine or criminal conspiracy inimical to the public welfare.

12. SAME. *Evidence of legislative intent. Laws* 1898, *ch.* 82, *p.* 97.

The fact of the enactment of Laws 1898, p. 97, ch. 82, making car service associations subject to the control and supervision of the railroad commission, is indicative of a legislative intent that such associations shall not be deemed within the inhibition of Code 1892, § 4437, defining trusts and declaring them illegal, or Laws 1900, p. 125, ch. 88, which accomplishes the same purpose.

13. SAME. *Laws* 1900, *ch.* 88, *p.* 128, *sec.* 7. *Proof.*

Under Laws 1900, p. 128, ch. 88, sec. 7, providing that proof that a party has been compelled to pay more for services by reason of the unlawful act or agreement of a trust than he would have been compelled to pay except for such unlawful act or agreement shall be conclusive proof of damage, mere proof that one has been compelled to pay more for a service than his competitors were paying for the same service, without proof that such excessive payment was due to the alleged wrongful act and agreement complained of, does not constitute the required proof of damage.

14. SAME. *Car service association. Not a trust.*

A car service association, which is merely the agent of different railroads in the enforcement of car service and demurrage

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charges, and which is not only without power to control the railroads intrusting their business to it, but cannot even fix the demurrage charges which it is its duty to assess, is not an illegal trust or combine, within the prohibition of Laws 1900, p. 125, ch. 88, defining such trusts as combinations or agreements by which any other persons than the contracting parties and their proper officers or employes shall have the power to conduct the control and management of their business.

15. SAME. *Bills of lading. Rules contained in.*

Rules contained in bills of lading, imposing demurrage for dilatory unloading of cars, are binding upon consignees, though they be in fact ignorant of their existence.

16. SAME. *When railroad may refuse service.*

While it is the duty of a railroad to switch and place cars coming from its own line, or tendered to it with proper transfer switching charges by any connecting line, and it cannot excuse itself from the performance of its duty by the existence of disputes as to the correctness of charges withheld pending adjustment, yet it is warranted in refusing to switch and place cars at the warehouse of a consignee who has not only arbitrarily refused to pay demurrage charges accrued in the past, but has expressed his intention of persisting in his refusal even if such charges be justly incurred in the future.

17. SAME. *Rule for collection of demurrage.*

A car service rule requiring prompt payment of demurrage charges and providing that no claim of mistake or overcharge will be considered unless the bill for demurrage is first promptly paid, does not subject consignees to a liability to imposition in the collection of demurrage, but leaves them free to prosecute actions for damages for the collection of overcharges or for refusing to render services when no demurrage is due or payment thereof has not been unduly delayed.

18. SAME. *Assessment of demurrage. Burden of proof.*

In a suit by a consignee for damages for extorting excessive demurrage charges or for withholding car service under a pretended claim for demurrage the burden is on the carrier to prove the proper assessment of unpaid demurrage, and that payment thereof had been refused or unduly delayed, within the terms of a rule requiring the prompt payment of demurrage charges.

19. SAME. *Account for demurrage.*

The fact that a bill for demurrage charges due a railroad was made out by direction of a car service association, to which the

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railroad intrusted its business in the collection of demurrage, and on its letter heads, does not justify the consignee in refusing to pay such demurrage.

FROM the circuit court of Warren county.

HON. GEORGE ANDERSON, Judge.

Searles, the appellee, was plaintiff, and the railroad company, the appellant, was defendant in the court below. From a judgment in plaintiff's favor for $60,861.30 and costs, the defendant appealed to the supreme court. The opinion states the facts.

Smith, Hirsh & Landau, Mayes & Longstreet, and *Blewette Lee,* for appellant.

McLaurin, Armistead & Brien, Green & Green, and *Claud Pintard,* for appellee.

[The briefs of counsel were withdrawn or lost from the record before it reached the reporter, hence no synopsis of them is given.]

TRULY, J., delivered the opinion of the court.

Stated in chronological sequence, the facts giving rise to this litigation are as follows:

On October 1, 1900, under the firm style of Searles Bros., C. J. Searles and T. M. Searles commenced business in Vicksburg, Miss. At that time, and for several years before then, the delivery of cars and the assessing of demurrage for detention thereof by consignees of freight had been under the direction of the Louisiana Car Service Association, of which N. S. Hoskins was manager. Of this car service association both the railroads entering the city of Vicksburg were members. On December 8, 1900, C. J. Searles, the managing partner of the firm of Searles Bros., wrote to N. S. Hoskins requesting leniency on the part of the car service association in consideration of his promptness in handling the largest part of his business and in view of the fact that he was then laboring under the disadvan-

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tage of not being able to secure an available warehouse in which to unload freight which might be consigned to his firm in carload lots. From this date until April, 1902, the record fails to disclose any variance in regard to the question of demurrage or car service between the firm of Searles Bros. and the car service association, or either of the railroads over which that firm received freight. From April until August 28, 1902, C. J. Searles, doing business as Searles Bros. and as successor to the Southern Brokerage Company, positively refused to pay any more car service or demurrage charges, and announced his deliberate determination not to recognize in any manner the authority of the car service association or its employes to assess said charges, and refused to have any conference in regard thereto with the manager or the local agent thereof. Frequent overtures were made to Searles by representatives both of the railroads and of the car service association seeking to arrive at some amicable adjustment of the pending dispute in reference to car service charges previously accrued, conditioned only that Searles would in the future recognize and comply with the rules of the car service association in reference to demurrage charges. All propositions of settlement or of arbitration were rejected by C. J. Searles, who firmly adhered to his announced decision of not recognizing the authority to any extent of the car service association. While this condition of affairs existed, on August 28, 1902, after first submitting the proposed order to the division superintendent of the Yazoo & Mississippi Valley Railroad Company, and receiving his approval thereof, N. S. Hoskins, manager of the Louisiana Car Service Association, directed that no cars should thereafter be switched to the warehouse where Searles Bros. and the Southern Brokerage Company transacted business or businesses. This warehouse, which Searles had secured subsequently to the writing of his letter to Hoskins, hereinbefore referred to, was located on a spur belonging to the Yazoo & Mississippi Valley Railroad Company, on which were also situated the warehouses of nearly all of Searles Bros.' chief

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competitors in the business in which all were engaged—wholesale produce, commission, and brokerage. For many years it had been the custom of the Yazoo & Mississippi Valley Railroad Company to switch freight received in car loads to the warehouses of the consignees. After October, 1902, C. J. Searles continued business as successor of the Southern Brokerage Company; managing partner of Searles Bros., composed of himself and his brother, T. M. Searles; and as C. J. Searles & Co., composed of himself alone. All these businesses were conducted at the same warehouse, and the refusal to switch cars or freight applied to all alike. From August 28, 1902, the date of the issuance of the order declining to further switch cars, until March 9, 1903, the Yazoo & Mississippi Valley Railroad Company, acting under said order issued by the manager of the car service association, with the approval of its superintendent, uniformly refused to place cars of freight at Searles' warehouse, but continued as theretofore to switch all freight in car-load lots to other merchants engaged in similar business occupying warehouses similarly located. The Yazoo & Mississippi Valley Railroad did, however, furnish to Searles, upon request, empty cars for the shipment of freight from his warehouse to other points, and did, with one exception, transfer all cars received over its road to the Alabama & Vicksburg Railway when so directed by Searles. On March 9, 1903, the chancery court granted to Searles a mandatory injunction commanding the Yazoo & Mississippi Valley Railroad Company to switch and place at Searles' warehouse freight received in car-load lots in the same manner that it did freight received for his competitors in business also occupying warehouses. Pending this suit, and prior to final hearing, an agreement was entered into, by which Searles and the railroad company each agreed to pay any demurrage which might fall due thereafter under the rules governing that matter, such payment to be without prejudice to the rights of either party in the pending litigation. Thereupon C. J. Searles, in the name of C. J. Searles & Co., filed his declaration in the

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circuit court against the Yazoo & Mississippi Valley Railroad Company, claiming that between the date of August 28, 1902, when first refusal to place cars was made, and the date of the filing of the suit, the Yazoo & Mississippi Valley Railroad had received over its own line, and refused to switch and place at his warehouse, or had refused to receive from the Alabama & Vicksburg Railway and switch and place at his warehouse, one hundred and thirty-five cars of freight in car-load lots, by reason of which action he had been compelled to receive his freight on the wagon and delivery tracks of the Yazoo & Mississippi Valley Railroad, all some distance from his warehouse, entailing on him an additional expense, for labor, draying, and extra clerk hire, of $1,905.05; and he also claimed in his declaration a statutory penalty of $500 for each car load of freight which the railroad had refused to switch and place at his warehouse, averring that the railroad and the car service association had discriminated against him; that the car service association was a "trust" or "combine" within the meaning of the Mississippi statute in that regard, whereby he was entitled, as the injured party, to receive the penalty allowed under the statute. The case was tried before the circuit judge, a jury being waived. In addition to the foregoing facts, it developed upon the hearing that Searles alone of all merchants in Vicksburg engaged in similar business refused to recognize the authority of the car service association; that, while disputes over bills had from time to time arisen between other merchants and the railroads in reference to the correctness of several assessments of demurrage charges, such disputes had been adjusted or were in process of adjustment, and that no order had been issued refusing to switch cars for any other merchant, though such order had been threatened in several instances when the settlements had been unduly delayed. It is undisputed in the record that cars would have been switched for Searles had he agreed to pay demurrage charges when the same might rightfully accrue under the rules of the car service association. It was further in

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evidence that the Louisiana Car Service Association operated solely in regard to the assessment of demurrage under rules in reference thereto adopted and promulgated by the Mississippi Railroad Commission, and that car service charges were not claimed except under the circumstances authorizing under said rules the collection thereof; that the order refusing to have cars switched and placed for Searles was issued, not by order of the executive board of the car service association or with its knowledge, but by its manager, after the same had been submitted to and approved by the division superintendent of the Yazoo & Mississippi Valley Railroad, and was issued solely for the purpose of enforcing compliance on the part of Searles with the rules of the Mississippi Railroad Commission, authorizing the collection of demurrage under certain stated circumstances. The circuit judge held that the car service association was a trust and combine within the meaning of ch. 88, p. 125, Laws 1900, and awarded Searles damages in the sum of $60,861.30, being the statutory penalty for each car of freight which the railroad had refused to place at his warehouse, and, in addition thereto, the amount paid out for the drayage and handling of the freight contained therein. From this judgment the Yazoo & Mississippi Valley Railroad Company appeals.

The first question presented for consideration in arriving at a decision in this case is: What is a "trust" or "combine" within the meaning and condemnation of the statute cited? A determination of this question necessitates a brief examination, at least, of the history of anti-trust legislation in our state.

Section 198, Constitution 1890, commands the legislature to "enact laws to prevent all trusts, combinations, contracts, and agreements inimical to the public welfare." It must be observed at the outset that not all trusts, combinations, contracts, and agreements were to be prohibited, because the great lawmakers who framed the fundamental law of this commonwealth as the same is embodied in our present constitution well knew that such legislation would be palpably trenching upon, if not abso-

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lutely violative of, the inherent rights of the citizen, and would be restrictive to an unwarranted degree of the privilege of contract which every man is entitled to enjoy under our form of government. Tiedeman, Lim. Police Powers, sec. 244. No such legislation was authorized, because no such legislation was demanded. Only such trusts, combinations, contracts, and agreements were to be prevented as would be "inimical to the public welfare." Acting under this authority, Code 1892, § 4437, was adopted, providing that a trust or combine is a combination, contract, understanding, or agreement, expressed or implied, between two or more persons, corporations, or firms and associations of persons, or between one or more of either and one or more of the others, to do certain things therein enumerated—amongst others, "(g) to place the control, to any extent, of business, or of the products or earnings thereof, in the power of trustees, by whatever name called; (h) by which any other person than themselves, their proper officers, agents, and employes, shall, or shall have the power to, dictate or control the management of business." And having enumerated the various kinds of contracts which were denominated trusts and combines, the section proceeds to declare them to be "inimical to the public welfare, unlawful, and a criminal conspiracy." An analytical study of this section demonstrates that it was the legislative design to prohibit and provide punishment for the formation of any criminal conspiracy by which the interest of the public might be in any manner injured or jeopardized, whether such combination was intended to be in restraint of trade, to limit, reduce, or increase the price or the production of any commodity, or to hinder competition in the importation, manufacture, transportation, sale, or purchase of any commodity, or to do certain other enumerated acts, which would, in the judgment of the legislature, prove prejudicial to the interest of the public or any part thereof, or of any individual; the reason for this legislation being—as is so aptly phrased by Whitfield, J., in *Insurance Company* v. *State,* 75 Miss., 24 (22 South. Rep.,

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99)—that: "Conspiracies of this class are raised to the grade of felony, and pronounced obnoxious to the public policy of this state, and inimical to the public welfare, by reason of the great mischief they are known, of all men, to accomplish, as manifested by the course of legislation and decision the country over. Such trusts constitute one of the greatest menaces to public welfare known to modern times, and the legislature has wisely made them felonies and denounced this severe penalty against them." The design of the legislature was to protect the public, not to unlawfully restrict the transacting of business by either corporations or individuals. The various kinds of legitimate business rendered necessary by the multiform demands of public convenience, the manifold callings which are an incident of this progressive age, all demand that the individual right of contract shall be given full sway, conditioned only that the rights of the public and the welfare of the people and the public policy of the state shall be held sacred. Says Terral, J., in *Houck* v. *Wright,* 77 Miss., 483 (27 South. Rep., 617): "The legislature, by the chapter on trusts and combines, did not intend to debar a person from conducting his own private business according to his own judgment." In this connection Whitfield, J., in *Insurance Company* v. *State, supra,* says: "It [the legislature] therefore prohibited any trust whose object was to place the control of any business in the power of trustees, where the effect of such trust should be to injure the public or any particular person or corporation in this state. Such legislation has become very general in the United States, owing to the pernicious results of such trusts." It appears, therefore, from these previously announced, well-considered, and strikingly accurate statements of the scope and purpose of the law by this court, that one of two things must exist in order to render a contract or agreement between two or more persons or corporations subject to the condemnation of paragraphs "g" and "h" of the act now under consideration: First, it must place the control to some extent of the business or of the products or

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earnings thereof, or it must give the power to conduct or control the management of such business, to trustees or persons other than the proper officers, agents, or employes of the contracting persons or corporations; or, second, it must have the effect of injuring the public or some particular person or corporation in this state.

The correctness of the definition which recognizes that a "combine," to fall within the purview of the legislative design, must have as a constituent element either a violation of public policy in that it tends to create a monopoly or is in restraint of trade, or that it involves a delegation and abandonment of corporate powers and is inimical to the public welfare, is emphasized and made more manifest by reference to legislation dealing with this subject enacted subsequent to the adoption of Code 1892, § 4437, hereinbefore cited. The purpose of the legislature of this state, the object it had in view, the evil it sought to prevent, appear in the title, given in conformity to the constitutional requirements as setting forth the subject-matter dealt with, to ch. 88, p. 125, Laws 1900, which is the latest expression of legislative will. That act is entitled "An act to define trusts and combines, to provide for the suppression thereof, and to preserve to the people of this state the benefits arising from competition in business." And the same intention is again declared in sec. 11 of the act, which directs that it shall be liberally construed to the end that trusts and combines may be suppressed, and the benefits arising from competition in business preserved to the people of this state. The benefits which the legislature sought to secure to the people of the state were those which naturally flow from competition in business. In order to insure these benefits, it was provided that any contract entered into between two or more persons or corporations should be unlawful if it in any wise restrained or decreased the advantages known to arise from competition in business, whether such contract was expressly and openly in restraint of trade, or whether, by its effect, it was indirectly liable to reduce or in-

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crease prices, to increase or reduce production, to engross or forestall or to hinder competition in production, manufacture, transportation, sale, or purchase of any commodity. All contracts, whether expressed or implied, which would necessarily or probably have any of the effects therein forbidden were declared to be violative of the announced public policy of the state in that they inevitably tended to reduce the benefits sought to be insured by the act. It was also forbidden for any two or more persons or corporations to issue, own, or hold the certificates of stock of any trust or combine. This provision was clearly aimed at the well-known plan by which the stock of various corporations, surrendering their own corporate entity, engaged in a partnership of their own, such arrangements being palpably in restraint of trade and tending inevitably to the creation of a monopoly. It was further provided by paragraphs "g" and "h" that it should be unlawful for two or more persons, firms, or corporations, or one or more of either with one or more of the other, to form any contract or combination by which the power to dictate or control the management of the business, or by which the control of the business or of the products and earnings thereof, was placed in the power of any other person than their own proper officers, agents, and employes. These paragraphs are a rescript of the provisions originally contained in sec. 4437, *supra*. It should be observed that these paragraphs, and in fact the whole chapter, deal with both corporations and individuals alike. And in construing such statutes the general rule is that the nature of the business contemplated by the contract or arrangement and the tendency of the contract as affecting the public, rather than whether the parties to the contract are corporations or individuals, are to be considered in determining whether it violates public policy. Hirschl., Combination, Consolidation, and Succession of Corporations, p. 2.

This consideration eliminates from this discussion the question of to what extent limitations upon the power to contract may be placed by the state upon corporations solely and only

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in a proper exercise of its reserved police power. When analyzed, the propositions contained in the paragraphs cited are not novel. They are, in truth, but mere announcements of familiar principles contained in varying form in many statutes germane to this subject. They and all the provisions of the act are but means to an end, details of the legislative plan. The result desired—the purpose of the entire legislation—was to suppress trusts, secure the benefits arising from competition in trade, prevent monopolies, and protect the people from the possible tyranny and oppression of combined wealth. In fact, a brief investigation will show that all modern anti-trust legislation is based upon the same fundamental principle. All combinations are forbidden the necessary, natural, or probable consequence of which will be to increase or decrease the price of production of any commodity, or which restrict facilities in the handling or transportation of the same. Contracts or agreements, of whatever character, by which the autonomy of corporations is surrendered and the exercise of their charter powers delegated to others, are denounced as violative of public policy. Corporations which enjoy no powers except those of which they are recipients by charter grant are without power to absolve themselves from the performance of their duties to the public, and contracts abnegating such performance and alienating the powers granted them by the state are void. *Central Transportation Co.* v. *Pullman Palace Car Co.,* 139 U. S., 24 (11 Sup. Ct., 478; 35 L. ed., 55); Ray, Contractual Limitations, p. 240. Arrangements, under whatever guise, by which the stock of several distinct corporations is placed in the hands of certain trustees, who are vested with power of voting it, are condemned as tending inevitably to the creation of monopolies and the absolute destroying of competition in the production or transportation of many commodities, and, as a direful result, a few individuals would be able to fix the price of the very necessities of life, with power to increase or decrease without regard to supply or demand, but solely as their greed and rapacity might dictate. The

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wisdom of such legislation and the imperative necessity of its strict enforcement is evidenced by the fact that the aggression of mighty aggregations of corporate wealth so formed now constitute one of the gravest problems with which the nation has to deal. *Northern Securities Co.* v. *U. S.,* 193 U. S., 197 (24 Sup. Ct., 436; 48 L. ed., 698); *Pearsall* v. *Great Northern R. R. Co.,* 161 U. S., 646 (16 Sup. Ct., 705; 40 L. ed., 838). In short, without unduly extending these observations, the formation of all contracts and combinations is condemned by which corporations or individuals are banded together for any illegal purpose; or, if such association be already in existence, the parties will be inhibited from continuing operations thereunder.

But at last the test, and only test, is not what the intent of the parties may be, not what form the combination has taken, but what will its probable effect be? If unlawful or oppressive, if obnoxious to public policy, if inimical to public welfare, they will be denounced and punishment meted out to every participant; otherwise, courts will not limit or restrict the inalienable right of contract, and will not interfere unless the violation of law be apparent or the apprehended evil effect assume some tangible form. Noyes, Intercorporate Relations, secs. 392, 401, 405. We uphold and maintain in its full integrity the doctrine which recognizes the right of the state, in the exercise of its reserved police power, to restrict the power of corporations to contract within certain prescribed limits, and which forbids that such power should ever be so abridged or so construed as to permit corporations to conduct their business in such manner as to infringe upon the rights of individuals or the general well-being of the state. That power inheres in the sovereign, and the protection from the encroachments of corporations is assured by the guaranty of sec. 190, Constitution 1890. But that doctrine is not assailed here. This is a case involving not legislative power, but legislative will. In this direct connection it must again be observed that by the act now under review what is forbidden to corporations is likewise forbidden to individuals.

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The contracts and agreements which are by paragraphs "g" and "h" condemned fall under the ban of the law, whether entered into by corporations solely among themselves, or jointly with individuals, or by several individuals alone.

It is contended that all combinations or contracts, without regard to purpose, intent, or effect, by which the control, to any extent, of business, or of the products and earnings thereof, is placed within the power of trustees, or by which other persons than the contracting parties or their proper officers, agents, or employes are given the power to dictate or control the management of business, are prohibited by the terms of the act. If this narrow construction is in fact the legislative intent, the entire law would be open to the just criticism of being a wholly unnecessary, if not an unwarranted, invasion of the inherent right of the citizen to deal with his own as he pleases, if without injury to others. *Gage* v. *State,* 24 Ohio Cir. Ct. R., 724. Carried to its logical conclusion, this argument would prevent any two or more individuals engaged in business from employing the same agents or representatives, or from placing in the hands of the same individual the right to control their separate businesses. So two planters, owning adjoining plantations, by employing the same manager to control both places, with power to manage the business, dictate to the laborers, and dispose of the products, would be guilty of a criminal conspiracy. Two jobbers who employ the same traveling salesman, with power to accept or reject orders to be transmitted to one or the other of the stores; or two merchants who employ the same drayman to haul and deliver their freight; or two express companies which employ the same messenger and deliveryman; or two railroad companies which employ the same ticket or freight agent at union depots; or two insurance companies which employ the same adjuster, with power to settle losses; or two lumber companies which employ the same attorney, with power to adjust disputed claims or impending litigation; and many other cases of everyday occurrence—would each be violative of the law now

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under consideration, and every participant therein would be subject to the severe penalties therein prescribed. We cannot adopt or sanction this restricted view. The true interpretation, in our judgment, is that only such contracts and agreements (within the purview of the paragraphs now under review) are forbidden which, on account of their natural result, are obnoxious to public policy, or which, in themselves, are by necessary effect inimical to the public welfare. Practically the same construction has been placed upon the anti-trust laws of other states, which, though clothed in different verbiage, contain substantially the same ideas and are designed to attain the same end. Thus the supreme court of Montana in a very recent case, in discussing the constitutional and statutory provisions of that state relating to this matter, says: The constitution "deals generally with the rights and powers of corporations and associations of persons exercising any of the powers and privileges not possessed by individuals or partnerships and their duties and purposes. It is prohibitory and restrictive in its general scope and purpose, the design of the convention in adopting its provisions being to prevent combinations to restrict or repress competition in all industrial pursuits and to protect the people in general and the employes of a certain class against both the legislature and combinations of capital from unjust impositions." And after showing that certain consolidations, such as that of competing railroads, telegraph and telephone companies, and the like, are absolutely prohibited, "as having a necessary tendency to restrict competition," the court proceeds to a discussion of the anti-trust statute: "Apart from these wholesome restrictions and prohibitions, the right of the people to accumulate property and to hold and enjoy it, either by individual effort or by means of associations of natural or artificial persons, is not restricted. Section 20 prohibits any combination or contract which has a particular purpose—to wit, 'fixing the price or regulating the production of any article of commerce, or of the product of the soil, for consumption by the people.' The terms

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'combine' and 'form a trust' were evidently intended to be read in connection with the expression 'for the purpose,' etc., clearly implying that, in order to subject offenders to the severe penalties which the legislature might impose, there must be shown a specific intent to do the prohibited act, or that the association or combination necessarily tends to accomplish the same result. That this is the meaning is clear from the enumeration of persons who may not do the prohibited acts. Corporations, stock companies, natural persons, and partnerships are all included. If the criminal intent is not a necessary ingredient of the evil denounced, then all sorts of combinations are to be deemed prohibited, even ordinary copartnerships, as coming within the letter of the prohibition; for the terms 'combine' and 'form a trust' are of equal dignity. If the former is to be regarded as modified and explained by the clause 'for the purpose,' etc., by the same rule must the latter also. The term 'trust' is assigned the meaning given to it by the text writers (Cook on Corp., sec. 503a; Spelling on Trusts, sec. 121), and includes any form of combination between corporations or corporations and natural persons for the purpose of regulating production and repressing competition by means of the power thus centralized." And after showing that the term was first used in a narrower sense and applied only to transfer of stock by several corporations to trustees, with power to vote, the court continues: "If it be construed as equivalent to the term 'combination' or 'consolidation,' the meaning of the section is perfectly clear; if used in the sense of the definition given it by the text writers, it is none the less clear, though it involves a repetition of the same idea, since the definition includes the idea of criminal purpose and makes it a necessary ingredient of the offense denounced. The section of the statute quoted involves the same idea and demands the same construction, though it is more specific in its provisions, and extends to and includes combinations in restraint of competition in transportation. It denounces every form of combination or contract which has for its purpose,

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directly or indirectly, the restraint of production or trade in any way or manner, or the control of the price of any article of consumption by the people. It was not the purpose of the convention or the legislature to limit either the term used in the constitution or in the statute by any narrow definition, but to leave it to the courts to look beneath the surface, and, from the methods employed in the conduct of the business, to determine whether the association or combination in question, no matter what its particular form should chance to be or what might be its constituent elements, is taking advantage of the public in an unlawful way. *Harding* v. *Am. Glucose Co.,* 182 Ill., 551 (55 N. E., 577; 64 L. R. A., 738; 74 Am. St. Rep., 189). In each case, therefore, under these provisions, the nature of the arrangement or combination is a question of fact to be determined by the court from the evidence before it or from the vice which inheres in the contract itself." *McGinnis* v. *Boston & M. Consol. Copper & Silver Min. Co.* (Mont.), 75 Pac., 94; *Ceballos* v. *Munson S. S. Line,* 93 App. Div., 595 (87 N. Y. Supp., 811), and cases cited.

Nor is the rule of construction different when applied to the federal anti-trust statute. "It is now settled," says the circuit court of appeals, "by repeated decisions of the supreme court, that the test of the validity of a contract, combination, or conspiracy challenged under the anti-trust law is the direct effect of such a contract or combination upon competition in commerce among the states. If its necessary effect is to stifle competition or to directly and substantially restrict it, it is void. But if it promotes, or only incidentally or indirectly restricts, competition in commerce among the states, while its main purpose and chief effect are to foster the trade or enhance the business of those who make it, it does not constitute a restraint on interstate commerce within the meaning of that law, and is not obnoxious to its provisions. This act of congress must have a reasonable construction. It was not its purpose to prohibit or to render illegal the ordinary contracts or combinations of manufacturers, merchants,

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and traders, or the usual devices to which they resort to promote the success of their business, to enhance their trade, and to make their occupations gainful, so long as those combinations and devices do not necessarily have a direct and substantial effect to restrict competition in commerce among the states." *Phillips* v. *Iola Portland Cement Co.,* 125 Fed., 594 (61 C. C. A., 19). And for an exhaustive and very lucid discussion of the same subject, in which the same result is reached, see the elaborate opinion in *Whitwell* v. *Continental Tobacco Co.,* 125 Fed., 454 (60 C. C. A., 290; 64 L. R. A., 689), supported by numerous extracts from opinions of the United States supreme court.

As the latest authoritative utterance upon this subject we quote from the opinion of the supreme court of the United States in *Northern Securities Company* v. *United States,* 193 U. S., 197 (24 Sup. Ct., 436; 48 L. ed., 698), where, among other propositions announced are plainly deducible from previous decisions of that court, which are reviewed, are the following, which embrace the case at bar: "That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains, instead of promoting, trade and commerce. That to vitiate a combination such as the act of congress condemns, it need not be shown that the combination in fact results or will result in a total suppression of trade or in a complete monopoly; but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce, or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition." Justice Brewer, in his concurring opinion in that case, also speaking of the federal anti-trust statute, says: "That act, as appears from its title, was leveled at only 'unlawful restraints and monopolies.' Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose, rather, was to place a

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statutory prohibition, with prescribed penalties and remedies, upon those contracts which were in direct restraint of trade, unreasonable, and against public policy. Whenever a departure from common-law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear, and such a departure was not intended. Further, the general language of the act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen."

By parity of reasoning we think these observations strikingly applicable to our own statute. The object of the federal antitrust statute is to preserve to the people of the entire nation the benefits arising from competition in business by preventing monopolies and contracts in restraint of trade in regard to commerce among the states. The object of the state legislation is to preserve to the people of the state the identical benefits by preventing monopolies and contracts in restraint of trade in regard to domestic commerce. To vitiate a combination such as the statute condemns, it is essential to show that by its necessary operation it tends to restrain trade or commerce, or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition, the trade or commerce so affected being domestic or interstate or foreign, according to whether the state or federal statute is invoked. But to vitiate the combination the effect must be detrimental to the interests of the public under either statute. An approved statement of the rule is this: "Combination for business purposes is legal. Combinations are beneficial as well as injurious, according to the motives or aims with which they are formed. It is therefore impossible to prohibit all combinations. The prohibition must rest upon the objectionable character of the objects of the combinations." Tiedeman, Lim. Police Powers, sec. 244. We adopt this announcement as accurate, with

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the additional proviso that, if the effect of the combination be evil, it will be condemned, no matter how praiseworthy its object may have been.

We cannot convict the legislature of having intended to prohibit the very many and constantly increasing number of perfectly legitimate contracts or combinations to which the growth of business or the exigencies of commerce give rise, and which are constantly multiplied by new avenues continually being opened by the thrift, progress, and invention of this era of complex business enterprises. Keeping in mind the clear statement before quoted from *Insurance Co.* v. *State, supra,* that only such combinations are forbidden as may have the effect of injuring the public, or some part thereof, or some corporation or private individual, the meaning of the statute and of the paragraphs particularly in question becomes perfectly plain, and the plan inaugurated by the legislature stands out in bold relief in all its details.

With this interpretation of the statute we pass to the consideration of the question whether or not the Louisiana Car Service Association, as disclosed by this record, comes within the condemnation of any of the provisions of the anti-trust law as the same now exists in our state. It is not contended that a car service association does anything to diminish the benefits arising from competition in business which are sought to be secured to the public. It is manifest that not only is a car service association not any restraint to trade, but, on the contrary, by insuring or endeavoring to insure the prompt handling of freight after it has reached its destination, by increasing the facilities for transportation, by requiring the speedy unloading of cars so that the same may again be placed in use, it tends to increase competition in business, and facilitates the transportation of every commodity handled through the agency of railroads. The record discloses that as a public agency car service associations are a power for good in the line indicated, and in no manner hinder competition in the importation or the transportation of

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any commodity. It is urged that a car service association, with the powers vested in it as shown by this record, falls within the scope and meaning of paragraphs "g" and "h" of ch. 88, p. 125, Laws 1900, in that it places the control, to some extent, of the business of the various railroads forming the association in the power of trustees, and permits other persons than their proper officials, agents, and employes to dictate or control the management of their business, and hence is such a combination as is forbidden by the statute referred to. In this connection it should again be observed that paragraphs "g" and "h" were first adopted in identical form in § 4437, Code 1892. At the date of their enactment car service associations were already in operation in many sections, including our own state. Since then their usefulness and the beneficial results which have followed from their operation have so demonstrated the advantage which they afford to both railroads and the public that at this time (so this record discloses) the railroads of the entire nation, with rare exceptions, are grouped into one or another of the many car service associations which now exist; so that in no part of the territory of these United States where car service associations are operating under reasonable rules and regulations, which are fairly, equitably, yet rigidly enforced, is it possible for the carrier to discriminate against the receiver of freight or for the consignee of freight to take an undue advantage of the carrier or of any competitor in business similarly situated. As originally devised, the demurrage charge which every car service association undertook to assess for undue detention of cars caused by dilatoriness in unloading the same by the consignee, the amount of *per diem* demurrage which could be levied, was solely within the discretion of the car service association. With this knowledge, and in order to prevent possible hardship by imposition of oppressive rates for demurrage, the legislature of our state, by ch. 82, p. 97, Laws 1898, wisely placed the car service association under the supervision of the State Railroad Commission. Recognizing the advantages which were incident to the operation of

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car service associations, the legislature, by this thoughtful and timely action, secured these advantages to the public, and at the same time shielded and protected the people from any possible hardship which might be caused by the imposition of exorbitant rates for delay in unloading. Acting under the power thus vested in it, the railroad commission adopted and promulgated certain rules in reference to demurrage charges, regulating the amount which could be imposed and setting out in detail the circumstances under which they might rightfully be levied, and then clothed the associations with authority to collect in all proper cases. And the implied warrant for their continued existence and operation evidenced by this action of the railroad commission in thus assuming control of them and formulating rules and regulations for their government is suggestive that the commission deemed neither their form, purpose, nor operation pernicious in effect, or in any wise detrimental to the public interests. It should be observed that these rules affixing penalties for undue detention of cars were not devised for the benefit of railroad companies alone, but were framed by the State Railroad Commission, a tribunal charged by law with the duty of supervising all common carriers for the benefit of the public at large.

Nor is the force of the inference logically drawn from this action of the railroad commission weakened by the suggestion that the commission has never undertaken to supervise car service associations, but has studiously refrained from assuming the authority vested in it by the legislature, and has restricted the operation of its rules in reference to demurrage and car service charges to the railroads solely. This contention will not bear the test of investigation. That the railroad commission has assumed and is now exercising supervision of car service associations is made evident by an inspection of the rules adopted and formally announced by the commission and accepted and established by the Louisiana Car Service Association for its guidance in transacting its operations. It is true that these rules require the railroad company handling the freight to give

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notice of the arrival of the car; but this is a mere announcement of the law as it exists, irrespective of the rule. This is a duty imposed upon the carrier by the law, and its prompt performance is, by the rule, made a condition precedent to the collection of any demurrage charges. Car service associations have nothing to do with the handling of freight or the notifying of consignees of its arrival. Their services are only called into requisition after "legal notice," as defined by the rules, has been duly given the consignee. It is also true that the rules speak of the demurrage charges being collected by the railroads, but this is again in accordance with the established usage of such associations. Car service associations are simply agencies employed by railroad companies to insure prompt, accurate, and impartial asssessing of demurrage; but in each instance it is assessed in favor of the railroad entitled to it, and it is collected by that railroad, sometimes by the car service association of which it is a member, sometimes by some other of its various employes, according to the custom of the railroad in reference to its collections. But by rule 11 the railroad commission prohibits any charges for demurrage or storage being made except as permitted by its said rules. Rule 12 limits the operations of the rule permitting demurrage charges to "places where car service rules are in operation," thus tacitly acquiescing in and indorsing the enforcement of car service rules; while rule 13 in express terms recognizes the existence of car service associations by providing that demurrage shall be collected for the detention of "private cars" when the same are detained, presumably, even by the owners of the cars, on the tracks belonging to or operated "by members of this association." It is a fact fraught with significance that these rules were not adopted by the railroad commission until by legislative enactment power to supervise car service associations had been vested in it. Finally, a reference to the records of the commission definitely settles its intent beyond the peradventure of a doubt, for the resolution adopting the very rules now under consideration in express terms declares that the

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rules are "adopted for the car service associations doing business in this state." And by resolution subsequently adopted car service associations were warned that "under authority conferred upon the railroad commission by ch. 82, Laws 1898," they were expected to make reports as the commission might direct. Record Book 3, pp. 149–164. It is manifest, therefore, that not only did the legislature intend to place car service associations under the supervision of the railroad commission, but that control was in fact assumed and exercised by the commission. We are forced, by these considerations, to the conclusion that this position of appellee is untenable.

The argument is strongly pressed that the Louisiana Car Service Association, by the manner in which it enforced its rules and regulations in the instant case, acted in such an unlawful or oppressive way as to put itself beyond the pale of the law, and deprived it of the rights and privileges granted by the rules and regulations of the Mississippi Railroad Commission. In addition to the rules regulating the collection of demurrage charges and stating the amount and circumstances under which the same might be collected, the railroad commission further provided: "Rule 9. No discrimination in charges allowed between persons or places. Railroads shall not discriminate between persons or places in storage or demurrage charges. If a railroad company collects storage or demurrage of one person, under the demurrage rules, it must collect of all who are liable. No rebate, drawback, or other similar device will be allowed. If demurrage is collected by the railroad company at one point on its line, it must collect at all places on its line of those liable under the rules of this commission. Provided, that the commission shall hear and grant applications to suspend the operation of this rule whenever justice shall demand this course." Without disobeying the express mandate of this rule, and thereby subjecting itself to the penalties prescribed by ch. 82, p. 97, Laws 1898, the Louisiana Car Service Association was without authority to refuse or neglect to collect demurrage from one merchant, when, under simi-

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lar circumstances and conditions, it demanded and received such charges from other merchants. This is forbidden, and most rightfully so, by the mandate of the railroad commission which gives to the operations of the car service association the sanction of its approval. Such favoritism would work discrimination of the grossest kind by giving to one merchant an unconscionable advantage over all competitors engaged in the same business. If a railroad or a car service association had the authority at its mere whim and pleasure to permit one merchant owning a warehouse on a side track to receive freight and keep it stored in its cars without demanding demurrage for their detention, while at the same time the collection of such charges was demanded and enforced of another merchant in the same line of business and owning a warehouse similarly located, it would place it in the power of the carrier by such arbitrary action to build up the one business and place a heavy burden upon the other. This rule was devised to prevent the possibility of such combination between carrier and merchant—an arrangement which would in truth be a "combine," with the inevitable and pernicious effect of decreasing the benefits arising from competition in business, because by building up one business and breaking down competition it would tend to create a monopoly for the benefit of the unjustly favored few. *American Warehousemen's Ass'n* v. *Railroad,* 7 Interst. Com. R., 556. An inspection of the rules of the railroad commission shows that the right at any time to suspend the operation of this rule whenever justice shall demand this course is expressly reserved, the object of this wise and thoughtful provision being, of course, that whenever, by reason of untoward or unforeseen circumstances, the imposition of demurrage charges would work a hardship or injury to any particular place or community, the rule could be suspended, so that what was designed as a benefit to the public cannot be converted into a weapon of oppression. In the instant case we find that during the entire period covered by this controversy demurrage was demanded and collected of

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every other merchant doing business in the city of Vicksburg by whom it was rightfully due. We find further that Searles alone of all men engaged in similar business—and, so far as the record discloses, of all merchants in the city of Vicksburg—denied the power and authority of the car service association to impose and collect demurrage. Under such circumstances it was not only the right, but it was the duty, of the car service association, representing in this instance the Yazoo & Mississippi Valley Railroad Company, to accord to Searles the same treatment which his competitors received. If on account of any special circumstances—of which, however, the record gives no hint—the imposition of demurrage charges in the city of Vicksburg worked a special hardship, the parties aggrieved had an adequate remedy by applying to the railroad commission to temporarily suspend the operation of the rule. This appellee did not do, contenting himself by refusing to pay demurrage and hauling his freight from the public delivery track by drays. The fair and impartial collection of demurrage is expressly enjoined upon car service associations, and they are forbidden to administer and enforce their rules "with an evil eye and an unequal hand," so as to make the unjust discrimination between persons or places in similar circumstances.

In the extremely elaborate opinion of the trial judge it is said: "If, therefore, the question was, Do the published rules of the railroad commission, adopted by the car service association, and being, as Mr. Hoskins, the manager, says, the only rules they have, constitute them a trust and combine under our statutes? probably plaintiff would have no standing in court. But it appears from the conduct of the parties composing this association and the testimony of their manager, Mr. Hoskins, that they operate under two sets of rules—one the exoteric, or published rules in evidence, known to and for the benefit of the outside public, including the courts; and the other the esoteric, or the arbitrary and discretionary powers of the manager himself, known only to and for the benefit of those living within the inner circle, the

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members of the association and its agents. It is the acts of the association under the latter rules that furnish the basis of this controversy, and which we are called upon to consider." And after an extended discussion the judge arrives at the conclusion that the Louisiana Car Service Association, by reason of its operation under certain unpublished rules, so called, has brought itself within the scope of our anti-trust statute. Applying settled principles of law to established facts, will this conclusion, in the light of this record, bear scrutiny? It is, of course, true that courts will look through the form to ascertain the character of any association, and will judge of its nature not merely by its promulgated rules, but by its actual operation as well, and will decide the question of its legality or illegality according to the true nature and probable effect of the arrangement, without special regard to the form which has been assumed in each particular instance. If an apparently innocent form is in truth but a disguise assumed to mask a sinister design, the court, disregarding the outward shape, will condemn the arrangement. This rule has the indorsement of the highest judicial authority. But it is equally as true that, if the form of the arrangement be legal and its aim and purpose such as the law will uphold, it will not be denounced, from the fact alone that the objects for which the agreement was entered into are occasionally effectuated by rules which are only invoked as it becomes necessary to cope with unforeseen contingencies as they arise. If the contract, understanding, or agreement be not of itself inimical to the public welfare, nor in contravention of express statute, it will be upheld, unless it be so operated as to become oppressive by infringing upon the rights of private individuals or unless it works to the detriment of the general public.

Making an application of these general principles to the concrete case here presented, we find that the Louisiana Car Service Association is one of a class of combinations the existence of which, in this state, is recognized by an act of the legislature; that the prime aim and purpose of similar associations has been,

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by repeated adjudications of courts of last resort, upheld, and pronounced beneficial to public and carrier alike; that the rules for its government and for the transaction of its general, ordinary, and routine business are framed by the railroad commission, the tribunal invested by law with absolute power of supervision; that, if unexpected cases arise, not covered by the general rules, the manager of the association copes with such difficulties in his discretion until his action in the premises can be reviewed by the officials composing the executive board of the association. The legality and validity of the general rules of the association being vouched for by the action of the railroad commission, the question next presented is: Was the special order of August 28, 1902, refusing to switch cars for appellee, so unreasonable in its terms and such an oppressive act as to make the association a combination inimical to the public welfare, or was it the exercise of such power as showed that the Yazoo & Mississippi Valley Railroad Company had surrendered the control "to any extent" of its business so that persons other than its proper officers, agents, or employes had the power to dictate or manage the same? This is the pivotal question upon this branch of the case. After the most careful and protracted consideration, we have reached the conclusion that the special order referred to was not, under the circumstances of this case, discriminative or oppressive. It was in fact but the re-enactment and putting in force of a rule of similar import which was in force with the Louisiana Car Service Association prior to the promulgation of the present rules by the Mississippi Railroad Commission and their adoption by the association. The enforcement of this special order was nothing more nor less than an effort to carry into effect that rule of the railroad commission which requires the collection of demurrage from all alike who are subject thereto. The condition of affairs as it existed at that date amply justified the Louisiana Car Service Association in invoking the aid of the rule in question. That rule is as follows: "Rule 10, sec. 2. On deliveries to private sidings, in cases where consignees or

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consignors refuse to pay or unnecessarily defer settlement of bills for car service charges, the agent will decline to switch cars to the private sidings of such parties, notifying them that deliveries will only be made on public delivery tracks of company, and will promptly notify the manager of the action taken." In almost identical terms this rule was before this court for consideration in a case involving the right to collect demurrage, the reasonableness of the rules, and the power to detain freight to enforce payment of demurrage and car service charges. At that time, after thorough investigation, upon full presentation of the question, this court announced as its conclusion that car service associations were legal, their charges just and enforceable, their rules valid and reasonable. *Railroad Company* v. *George,* 82 Miss., 710 (35 South. Rep., 193); and see rule 3. We see no reason to withdraw from the position assumed in that case, which has been strengthened and fortified by several strong and well-reasoned decisions in other jurisdictions. *Railway Co.* v. *Dorsey Fuel Co.,* 112 Ill. App., 382; *Railroad Company* v. *Midvale Steel Company,* 201 Pa., 624 (51 Atl., 313; 88 Am. St. Rep., 836); *Schumacher* v. *Railroad Co.*, 207 Ill., 199 (69 N. E., 825); *Pennsylvania Millers' State Ass'n* v. *P. & R. Ry. Co.,* 8 Interst. Com. R., 531.

Did appellee, by his conduct, bring himself within the operation of this rule? For reasons which are apparent, and the justice of which is readily demonstrable, the rule under consideration says to the favored consignee having a warehouse on a private siding: "If you will pay demurrage and car service, you can enjoy the advantage of having your car-load freight delivered at your warehouse; but if you refuse to pay or unnecessarily defer paying for such service, you must get your freight at the public delivery track, as do less favored consignees." Appellee refused to recognize the car service association, refused to comply with its rules, refused to pay demurrage charges, without knowledge and without inquiry as to their justness or correctness and without reference to what representative of the appel-

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lant sought to collect them, planting himself squarely on the ground that he would not allow the car service association to in any manner concern itself with the handling of his freight. It is suggested in argument that the reason of these repeated refusals was because appellee had an unadjusted claim for damages to a car of corn, but the record shows that the dispute about the corn arose long subseqtient to the issuance of the order refusing to switch cars for appellee. But, even if true, this would be no valid excuse justifying appellee in refusing to pay demurrage when the same was justly due. Demurrage is secured by a lien on the freight in the specific car for the detention of which the charge has been incurred, and this lien must be discharged before the consignee has any right to demand the possession of the freight. It is manifest, and practically undenied in the record, that appellee denied the legality of demurrage charges as assessed by the car service association, and announced his intention of ignoring its action. In the face of this expressed determination by appellee, the Louisiana Car Service Association and the Yazoo & Mississippi Valley Railroad Company were forced to choose one of two courses: either continue to switch and place cars for appellee without collecting demurrage, and thus allow him an unconscionable advantage over his competitors, and also subject themselves to the penalties provided for disobedience to the mandates of the railroad commission, or invoke the rule which permitted them to refuse to further switch cars for an uncompromisingly recalcitrant consignee. Confronted by this condition, brought about by the persistent refusal of appellee, appellant and the car service association chose the latter horn of the dilemma, and in so doing, in our opinion, they were clearly in the right. The facts do not bear out the suggestion that this order was simply a retaliatory measure on the part of the appellant to punish appellee for his contumacy. Before the order was issued repeated overtures were made to appellee looking to a settlement of the pending differences; propositions of arbitration and an offer of sübmission to the sole decision of a

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gentleman of highest probity, pre-eminent ability, a profound jurist, and closely allied to the appellee, were all rejected. From start to finish of this controversy the issue was forced by appellee. The further switching and placing of cars at appellee's warehouse would have been a delivery of each particular car, and to have thus continued to deliver car loads of freight to a consignee who declared his intention of persisting in his refusal to recognize the validity of demurrage charges would have entailed upon the appellant endless litigation, inasmuch as suit must have necessarily been brought for the demurrage accruing on each shipment, thus breeding a multiplicity of suits and conserving no good end. A just observance of the rights of the shipper and of the consignee is mandatory on every common carrier. They are responsible for actual damages caused by unwarranted and avoidable delay in the transportation of freight, and are accountable for every dereliction of duty. The rights of the shipper and consignee being amply protected, the carrier is entitled to equally fair dealing at the hands of the consignee. If the placing of cars after arrival at destination is unduly delayed, without lawful excuse, the consignee who may be entitled to have his cars switched and placed can recover not only demurrage, but such actual damages as may be caused by the negligent delay of the carrier. With equal justice the carrier has the right to demand and collect of the consignee demurrage for his unreasonable dilatoriness in unloading the cars after they have been so placed. There is a reciprocity of indemnity under the rules governing demurrage promulgated by the Mississippi Railroad Commission. We have narrated somewhat at length the facts and circumstances attendant upon the issuance of the order of August 28th, so that the relative attitudes of the parties might be apparent, for the reason that this will become of vital importance when we come to the consideration of another branch of the case.

The reasonableness of the order, so far as its general tenor and effect are concerned, being established, the question whether

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it was rightfully invoked in the instant case does not affect the question of whether a car service association is or is not a trust or combine. So far as that question is concerned, it may be conceded that the enforcement of the order against appellee was unwarranted; but this, while rendering appellant liable to damages, would not alter the character of the association or in any manner assist us in determining its real nature. That every railroad company is entitled to charge and receive extra compensation for extra services rendered after the arrival of freight at its destination, such as reconsignment charges, car service or switching charges, demurrage, and the like, and that, acting alone, each railroad would have the right to collect such charges for itself in every proper case, is now finally settled beyond dispute. *State ex rel.* v. *Atchison, etc., Ry. Co.,* 176 Mo., 687 (75 S. W., 776; 63 L. R. A., 761); Baldwin, Am. Ry. Law, p. 357; Elliott on Railroads, sec. 1567; *Schumacher* v. *Railroad, supra.* It could therefore only be for exceptional cause of oppression or wrongdoing that an agreement among several railroads, each of which is entitled to enforce such charges, by which a plan is devised for the accurate assessing and convenient and inexpensive collection of such charges for each of the contracting companies, should be pronounced unlawful by the courts. An agreement lawful in its character and lawful in its purpose is not rendered unlawful even if some of its members should attempt to put it to an unlawful use. Eddy on Combinations, 369; *Commonwealth* v. *Brown,* 23 Pa. Sup. Ct., 470. In *Commonwealth* v. *Carlisle,* Brightly, N. P. 36, the rule is thus stated: "When the act is lawful for the individual, it can be the subject of a conspiracy, when done in concert, only when there is a direct intention that injury shall result from it or when the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals and where such prejudice or oppression is the natural and necessary consequence." In our judgment the trial judge erred in holding that the order of August 28th, issued under the circumstances set forth in this record, and not of itself

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unreasonable in its express terms, being simply the exercise of a power previously sanctioned by this court, was an "esoteric rule" of such baneful nature that it transformed an association lawful in its purpose and beneficial in its results into a criminal conspiracy "inimical to the public welfare." We have found no authority sustaining such a proposition. Eddy on Combinations, p. 1328.

We are next urged to declare the Louisiana Car Service Association a trust and combine, because, it is contended, the testimony in this case shows that its formation involved the delegation by the corporations constituting its membership of the management and control of their business to the persons managing and operating the association; that, these persons not being the "proper officers, agents, or employes" of the railroad companies, therefore the arrangement falls beneath the ban of condemnation pronounced by the law which forbids any person other than the proper officers, agents, or employes of a corporation to "control the management of its business to any extent." And in support of this position it is said: Concede that car service associations, as institutions, are legal in their nature; that, as a general rule, they violate no provision of law, and as operated they are not to the detriment of the public interest; and that they are entitled to be upheld so long as they govern themselves solely by the rules formulated for their government by the railroad commission—still it is contended the testimony shows that this particular car service association to which appellant belongs is a combination in violation of law, because it is not, nor are its operatives, the proper officers, agents, or employes of appellant, and yet the association is vested with power to control the management of the business of its members to some extent. And the special order of August 28th is referred to in support of this argument. But the premises in no wise warrant the conclusion. The argument assumes that the Louisiana Car Service Association and its operatives are not the agents of the appellant, and then assumes that the order referred to was issued in

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the exercise of an arbitrary discretion on the part of the manager of the association, and, having thus assumed as true all that it was necessary to prove, proceeds to draw the conclusion indicated. This is "vaulting the chasm," both in logic and in law. Let us see if the proof warrants either assumption. In another connection we have already referred to ch. 82, Laws 1898, whereby the legislature made all car service associations doing business in this state subject to the control and supervision of the railroad commission. In view of this action on the part of the law-making power of the state, having authority to authorize or forbid the operation of such associations, the contention that a car service association is of itself a "combine" forbidden by the law is untenable. It is not conceivable that the legislature would thus recognize and give at least an implied approval to the existence of an association, if the same at that very time stood condemned by the law. It cannot seriously be contended that the legislature acted in ignorance of the end which was sought to be furthered by the formation of such associations or the functions which were exercised by them, for the act itself states that they are "associations governing or controlling cars or rolling stock of railroads." Yet it would be necessary for us to impute this inexcusable ignorance to the legislature if we were to accept as sound the contention that it was thus dealing with an association which was, under § 4437, Code 1892, at that very moment operating in open and palpable violation of law. It cannot be conceived that the legislature would solemnly submit to the supervision and control of the railroad commission an association which could only exist, if appellee's argument be sound, in defiance of express statute. The very fact that the legislature thus gave at least implied sanction to associations which are distinctly recognized as possessing and exercising the power of "governing or controlling cars or rolling stock of railroads" (which is practically the extent of the authority of the car service associations, as it is their prime object) is strongly persuasive that such was not the control or management of busi-

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ness "to any extent" dealt with and condemned by paragraphs "g" and "h" of our anti-trust laws. The legislature permitted them to exist as associations "governing or controlling cars or rolling stock of railroads," and this record shows neither the existence nor the exercise of any other authority of control by the Louisiana Car Service Association. Car service associations, like other representatives of corporations, have no authority save such as is specially intrusted to them, and have no power of control beyond the plain and well-defined boundary lines of their duty, and have naught to do with the earnings of the railroads composing their membership, have no connection with any traffic arrangements, are without power to institute suits or proceedings of any kind in the name or on behalf of any of their members, and are in no wise connected with the internal management or financial affairs or corporate policy of any railroad, having not even the power of fixing the demurrage charges which it is their duty to assess. The main end and purpose of their existence is to prove of benefit to consignor, carrier, and consignee by expediting the transportation of freight, facilitating its delivery, and insuring prompter and more satisfactory service by and for all alike. Car service associations are the agents and employes of the various railroads forming such associations. The salaries of the manager and his subordinates are contributed to proportionately by the different members, while within the scope of its employment and duty the association serves and represents all its members. Car service associations are simply the agencies employed by railroad companies for the convenient and accurate assessing of demurrage.

It is also undeniably true that in the instant case the manager of the Louisiana Car Service Association did not assume to have the authority, and in fact did not undertake, to "dictate or control the management of business" of appellant "to any extent" beyond the power granted to all car service associations by the rules of the railroad commission. Before the order of August 28th forbidding the switching of cars to appellee's warehouse in

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the future was issued, the same was submitted to the proper officials of the two railroads concerned, and received the approval of one and was put into effect as to that road, while, upon the objection by the officials of the other, it was annulled and revoked as to it. This potential fact stands like a signboard at a parting of the ways, and points unmistakably to the correct conclusion. Is it not proof positive that the manager of the car service association, outside and beyond the rules formulated by the railroad commission, under which this particular association operates, is subordinate to the officials of the railroad to be affected by any special order which he may desire to issue? No other hypothesis furnishes a reasonable explanation of these facts. If the manager was clothed with unlimited and unquestionable authority, what the necessity for conferring with the railroad officials prior to the issuance of the order? If the Louisiana Car Service Association was supreme, why should the order have been rescinded upon the mere objection of the superintendent of one member of the association? Whatever discretionary powers may be vested in the manager of the Louisiana Car Service Association generally, sure it is that this record disclosed no wrongful exercise or abuse thereof. In the absence of proof of injury or wrongdoing, courts will not indulge in inferences to effect the invalidation of contracts or agreeements legal in form. But, aside from the evidence, the weakness which undermines appellee's position is an evident misinterpretation of the meaning of the statute when it forbids corporations placing the "control of the management of business to any extent" in the hands of others than their proper officers, agents, or employes. The argument seems to proceed upon the theory that "control to any extent" is a synonymous expression with "control of any part of its business." But this is erroneous. Every employe of a corporation is vested with power to control to some extent some part of the business of his master; but this does not come within the condemnation of the law, otherwise it would be impossible for any corporation to operate at all. The evil

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which the law was intended to prevent was the surrender by one or more corporations of their corporate functions, the delegation of the powers granted by their charters to other persons in no wise subject to or connected with such corporations, so that the business of the several distinct combining corporations would be managed, controlled, and dictated by these chosen trustees. This scheme, according to the most approved authorities, was the first form adopted by "trusts," and it was at this plan that the condemnatory anti-trust law was, in the first instance, directed. "Control" of the business of a corporation, within the meaning of all anti-trust legislation, so far as by our researches we have been able to discover, means power to dictate the corporate action of the corporation, not the mere management of some special limited department of its operations. Noyes on Intercorporate Relations, sec. 294, *et seq.; United States* v. *Northern Securities Company* (C. C.), 120 Fed., 726, and cases cited. If this is not the correct view, it would be unlawful for connecting railroads to employ the same yardmaster, switchman, depot master, ticket agent, or other joint employe at union depots; for in the very nature of things each of such employes has "control of the management of business" of all the corporations which he represents in his particular, though limited, sphere of action. The car service association has no greater power. It, too, is confined within the strict limits of the scope of its duty. If, then, a railroad by joining a car service association does not surrender its corporate autonomy, neither of the assumptions of appellee in this regard can be sustained by the proof. The car service association and its employes are the agents and representatives of the railroad, and the control (in the legal sense) of the business of the railroad is not "to any extent" vested in the car service association. It follows from this view that the question of how the membership of the executive board of the association is constituted is not material.

Again, it is said that under the provisions of sec. 7, ch. 88, p. 128, Laws 1900, in suits like the present one, founded on that

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statute, "proof by any party plaintiff that he has been compelled to pay more for any service rendered by any corporation exercising a public franchise by reason of the unlawful act or agreement of the defendant trust, its officers, agents, or attorneys, than he would have been compelled to give but for such unlawful act or agreement, shall be conclusive proof of damage," and thus proof of damage alone will entitle the plaintiff to recover the statutory penalty of $500 for each instance of damage. The argument is presented in this form: The plaintiff has been compelled to "pay more for a service rendered" by the appellant, which is a "corporation exercising a public franchise." This is "conclusive evidence of damage;" *ergo,* the plaintiff is entitled to recover. The argument is adroit, but specious. Its fallacy consists in this: It ignores the face that, to enable the plaintiff to recover by the terms of the statute, he must have been compelled to pay more for some service "by reason of the unlawful act or agreement," and he must have been compelled to give more than he would have been but for such "unlawful act or agreement." Concede that appellee was compelled to pay more for the service of delivering his freight than were his competitors doing business and having warehouses on the same switch; was this because of any "unlawful act or agreement" on the part of appellant? By no means. Appellee himself refused to comply with the rules and regulations governing the delivery of cars to warehouses. Did appellee have to pay more for any service than he would have been required to pay but for some "unlawful act or agreement?" The answer must again be in the negative. Had there been no car service associations, no agreement between the railroads of any character, appellee must still have paid demurrage, and this charge was no more and no less, neither increased nor diminished, by reason of the car service association. If there were no car service associations, railroads would still be entitled to demand car service and demurrage. This is settled beyond cavil or disputation, settled by custom and usage, by rule of the railroad commission, by prior decision of

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this court. Elliott, Railroads, sec. 1566 and note, sec. 1567; *State ex rel.* v. *Atchison, etc., Ry. Co., supra; N. O. & N. E. R. R. Co.* v. *George, supra.*

We hold that a car service association is not such a "combination, contract, understanding, or agreement" as is condemned by our anti-trust law; that it is not "inimical to the public welfare," does not "infringe upon the rights of the individual or the general well-being of the state," and that it is not an abandonment of corporate autonomy or a delegation of corporate functions. Elliott, Railroads, sec. 1568; *Ky. Wagon Co.* v. *Ohio Ry. Co.,* 98 Ky., 152 (32 S. W., 595; 36 L. R. A., 850; 56 Am. St. Rep., 326); *Railroad* v. *Midvale Steel Co., supra.* See, as illustrative, *State* v. *Terminal Ass'n* (Mo. Sup.), 81 S. W., 396. But, on the contrary, we find that its form is lawful, its aim and purpose legitimate, and its effect beneficial to the public, in that its operation tends to stimulate competition in business and increase the benefits arising therefrom. As the Louisiana Car Service Association is not a "trust or combine" within the meaning of ch. 88, p. 125, Laws 1900, so the appellant, by becoming a member thereof, did not subject itself to the penalties prescribed, and hence appellee is not entitled to recover the statutory penalty awarded by the statute to every one injured or damaged by the operation of a trust.

We have not thought it necessary to burden this opinion with extended extracts from authorities sustaining our position. These have been gathered from a vast field of legal research, and are systematically, accurately, and discriminatingly arranged in the briefs in this case, which are in themselves veritable storehouses of learning upon this and allied subjects. We content ourselves with a reference to them, and a bare citation of a few leading authorities from which we have deduced the general propositions herein announced. The conclusions arrived at upon the construction of our own statutes we give as the result of serious, prolonged, and mature consideration, in which we have not

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been unmindful of the gravity of the issues or the immensity of the interests involved.

Much that we have said in this connection applies with equal force to the claim of the appellee for actual damages said to have been suffered by reason of his having to haul his freight by team from the public delivery tracks of the railroad. And right here it becomes important to consider the relative attitude of the parties when the order not to switch cars for appellee was first put in force. The rule imposing demurrage for dilatoriness in unloading cars is binding upon consignees, even if they in fact be in ignorance of its existence. In a very recent case the supreme court of Pennsylvania says: "The further objection to plaintiff's claim is that it does not aver expressly or impliedly that these parties ever became parties to any contract for payment of demurrage on detained cars. But they were parties to the contract of shipment over plaintiff's railroad, and this is averred; and then, further, it is averred that since the demurrage rule was adopted it has formed part of the contract of shipment. This is sufficient averment of the implied contract. As a consignee of goods over plaintiff's railroad, it impliedly contracted to submit to all reasonable rules for the regulation of shipments. That the shipper was not consulted in framing the rules does not affect their validity. *Wagon Co.* v. *Ohio Railway Co., supra.* There is no duty on a common carrier to consult either its shippers or consignees as to the wisdom of its rates of freight for carrying or rules for demurrage. As to the one, it cannot exceed a lawful rate; as to the other, it cannot exceed a reasonable charge. Within these bounds it is presumed, in the interests of its stockholders and the public, to properly conduct its own business." *Railroad* v. *Midvale Steel Co.*, 201 Pa., 630 (51 Atl., 313; 88 Am. St. Rep., 836); *Schumacher* v. *Railroad, supra.* The instant case falls clearly within this reasoning. The bills of lading under which appellant handled the cars giving rise to this litigation—"the contract of shipment"—contained an express provision that all car-load freight should be liable

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to charge for "trackage and rental" for detention, said charge to commence "after the expiration of forty-eight hours from its arrival at destination." This was appellee's contract with appellant, and the law imputes to him knowledge of its terms, and he was legally bound thereby. The soundness of this proposition was recognized by the trial judge. We quote from his opinion: "There was probably no legal excuse for plaintiff's conduct in the premises, for he was legally bound to observe any reasonable rules in force as to demurrage and car service." But it is further said that appellee's wrongful action did not justify the railroad company "in violating its common-law and statutory obligation" to appellee to deliver freight; this conclusion, of course, being founded on the principle that in the discharge of its duty to the public no corporation enjoying a public franchise can conduct its business according to the whim or caprice of its agents, or can arbitrarily, without special reason, refuse to serve any one seeking its service. Limiting that general principle to the matter here in dispute, it is likewise true that no carrier has the right, on account alone of a dispute arising from a doubt as to the correctness of a particular bill or several bills for demurrage already past due or an honest difference of opinion as to the justice of the charge on any number of cars already received and delivered, to refuse to "switch and place" other cars subsequently received. No carrier can refuse its services to any one desiring them on the ground alone of an unadjusted claim then pending, or on account of any previous violation of contract by such person, no matter how flagrant and inexcusable, if such person at the time the service is demanded is legally entitled thereto. A refusal on the part of the carrier in such case would entitle the person aggrieved or injured to recover full compensation; and if such action was dictated by vindictive motives or by a desire to wantonly oppress and injure the particular person, the offending carrier would be liable to punitive damages as well. But this result follows not because the carrier was a member of a car service association, but by reason of the

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firmly established and rigidly adhered to rule of law which makes the master respond in damages, both actual and exemplary, for every wanton and willfully oppressive violation of duty by the servant, whether the servant committing the wrong be a car service association or other agent or employe. This principle of law is of universal application. It was the duty of the appellant primarily to "switch and place" all cars coming over its own line or tendered to it with proper "transfer switching charge" by any connecting line. It was the duty of the appellee to pay all freight charges and demurrage charges due on his freight and the cars containing the same. This, by contract entered into, evidenced by the bills of lading, he had bound himself to do. So long as appellee complied with his contract, he had the right to insist on faithful and prompt compliance on the part of appellant. More than this, even if, on account of doubts and disputes as to the correctness of justice of special instances of charge, freight charges or demurrage had been withheld pending adjustment, this would not of itself absolve the carrier from the discharge of its duty as to other car loads of freight subsequently received. No past violation of contract on the part of a consignee can justify a carrier in failing to discharge a present duty. But in the case at bar, according to the testimony for the appellant, not directly denied by appellee, appellee not only arbitrarily refused to pay demurrage charges which had accrued in the past, but expressed his intention of persisting in his refusal even should such charges be justly incurred in the future. If this be true, appellant was warranted in its refusal to further switch and place cars at appellee's warehouse. By delivering the cars at the warehouse appellant would have lost its lien, and could only have collected its charges from appellee directly, and he had already evidenced his intention of not paying. We know of no principle of law under which any one can announce an intention of not paying for a particular service and still rightfully demand that such service shall be rendered, particularly where the charge for such service is ad-

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mitted to be just and reasonable and is in fact paid by all others who enjoy the benefit of it. And yet this is the attitude occupied by appellee, if the testimony for appellant, uncontradicted in this record, be true. Nor is it true, as contended, that consignees are liable to imposition in the collection of demurrage charges because of the rule which requires that the payment of demurrage bills shall not be unduly delayed, and that no claim of mistake or overcharge will be considered unless the bill for demurrage, over which the dispute arises, has been first paid. Car service associations can collect demurrage only in the amount and under the circumstances permitted by the railroad commission. If they disregard those rules, and undertake to extort more, or to collect when not entitled thereto, they are liable to all the penalties prescribed against common carriers for disobedience of the mandates of the railroad commission. In addition, the consignee would have his action for damages for any extortion which might be imposed on him by collecting more than was due or for refusing to "switch and place" cars when no demurrage was due and when the payment of no bill really due had been unduly delayed. In a suit for such damages the burden would be on the carrier to prove that such unpaid demurrage was properly assessed, was justly due, and payment thereof had been either refused or unduly delayed after demand for payment first made. As the duty is on the carrier to serve all patrons alike, in case of failure to do so it devolves on it to prove facts which, under the rule, will justify its action. The law affords ample protection to the consignee against both extortion and discrimination.

Appellee's contention that he had a right to refuse to pay because the bills of charges were made out by direction of the car service association, and on its letter heads, we mention simply to reject. They were made out in favor of appellant, were due to appellant for services claimed to have been rendered by it, and appellant had the right to employ such lawful agency as it chose for the discharge of its private business. It would scarce-

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ly be seriously contended that a consignee who had repeatedly failed to pay transportation charges when the freight was delivered to him without prepayment being required could still rightfully demand that he be allowed to continue to remove the freight without first paying the charges. And yet the right of the railroad company to collect freight charges is no better established than is its right to collect demurrage in proper cases. One is for the transportation of the freight and the use of the cars in transit; the other, for the use of its track and rental for the cars after they have arrived at their destination.

The evidence adduced on the trial proved conclusively that prior to the refusal of appellee to pay demurrage the same treatment was accorded him as all others similarly situated, and this makes manifest the accuracy of the statement quoted from the opinion of the trial judge that "there was no legal excuse for plaintiff's conduct in the premises." Inasmuch, therefore, as appellee himself violated the terms of his contract of shipment without "legal excuse for his conduct," and as the actual damages complained of were entailed on him as the result of his own act, this judgment cannot be sustained. One who himself first wrongfully breaches a contract has no standing in court when he seeks to recover damages caused by a failure of the other party to fulfill his part of the same contract.

Reversed and remanded.

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JOHN B. GREEN ET AL. v. BENJAMIN A. WEEMS ET UX.

HUSBAND AND WIFE. ***Conveyances.*** ***Code*** **1892, § 2294.** ***Creditors.***

A conveyance executed for value and in good faith by a husband to his wife cannot be avoided by a creditor of the husband whose debt was unsecured at the time, under Code 1892, § 2294, providing that a conveyance between husband and wife shall not be valid as against a third person unless it be filed for record, where it was filed for record before the creditor obtained a lien.

FROM the chancery court of Lamar county.

HON. THADDEUS A. WOOD, Chancellor.

Green and others, the appellants, trading under the name of Green & Sons, were complainants in the court below; Weems and his wife, appellees, were defendants there. From a decree in defendants' favor the complainants appealed to the supreme court.

Benjamin A. Weems was a merchant, and in May, 1902, purchased merchandise from appellants, and afterwards gave them his note for a balance due on the goods. On December 15, 1901, Benjamin A. Weems made and delivered a deed to his wife, Lillian B. Weems, conveying to her the land involved in this suit. This deed was acknowledged April 29, 1902, but was not filed for record until July 28, 1902. Appellants brought suit in the circuit court on their note and obtained a judgment against Benjamin A. Weems in January, 1904. They then filed the bill in this case against Benjamin A. and Lillian B. Weems, seeking to set aside the deed made by Benjamin to Lillian as a fraud upon his creditors, and to subject the property to the payment of their judgment.

The statute is as follows: "2294. *What necessary to validity of conveyance.*—A transfer or conveyance of goods and chattels or lands between husband and wife shall not be valid as against any third person, unless the transfer or conveyance be in writing and acknowledged and filed for record as a mortgage or deed of

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trust is required to be, and possession of the property shall not be equivalent to filing the writing for record; but to affect third persons, the writing must be filed for record."

C. G. Mayson, and *McWillie & Thompson,* for appellants.

The appellants were creditors of the defendant, Benjamin A. Weems, before the deed from himself to his wife was filed for record, and the deed is therefore void as to appellants, because of the provision of Code 1892, § 2294.

A lien or secured creditor does not need the protection of the statute; and if no other creditor is protected by it, then it is a dead letter so far as concerns creditors.

The provision of the statute is that a conveyance of lands between husband and wife shall not be valid as against a third person unless the conveyance be in writing and acknowledged and filed for record. Most unquestionably the conveyance here involved was not valid against Green & Sons until recorded, and the possession of the property, by the very terms of the statute, was immaterial. The question of Weems' financial condition is not at all material. A husband may be immensely wealthy, and yet the conveyance of a most trifling piece of property by him to his wife is void under the statute as against unsecured creditors. *Black* v. *Robinson,* 62 Miss., 68; *Gregory* v. *Dodds,* 60 Miss., 549.

Such cases as *Graham* v. *Morgan,* 83 Miss., 601, are quite beside the mark. No question of whether the conveyance was made in good or in bad faith is involved; no question of whether the husband was indebted to the wife and undertook to make the conveyance in payment of a *bona fide* debt is before us.

In *Gregory* v. *Dodds,* 60 Miss., 549, this statute, then Code 1880, § 1178, was first construed, and it was held that whether the conveyances were made *bona fide* or *mala fide* they were void as to all third persons, and that they were void as to creditors, whether subsequent creditors or antecedent ones, and

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whether the third person's rights accrued before or after the pretended transfer.

The section of the code itself is peculiar, and is unquestionably broad. The words "creditor" and "purchaser" are not used; neither of them is used; but the parties as against whom the conveyances are void are "any third person." Every man is presumed to contract debts, to some extent at least, upon the faith of his ownership of property, and when the husband, Benjamin A. Weems, bought complainants' goods, presumptively the appellants extended credit on the faith of the ownership of the property involved in this suit.

At the time Green & Sons became creditors the pretended deed was void as to them, and that, too, even if it be true that it was signed by the husband and delivered to the wife on the 15th of December, 1901. Can it be that the conveyance was void as to appellants before, and that it became valid on the 28th of July, 1902, simply from the fact that it was lodged for record on that day? Nothing was done by the husband to give it validity in July, 1902. Can it be that a wife may receive a conveyance from her husband which is utterly void, that she can hold it until her husband contracts debts on the faith of his apparent ownership of the property, and, after the contraction of debts by her husband, she can put the void deed of record and thereby defeat her husband's creditors? Most manifestly this would be inequitable and unjust. It would be to reëstablish the old condition of affairs which the section of the code was intended to defeat. Secret and private conveyance between husband and wife, whose relations to each other are so close as to baffle all investigation, was what the legislature intended to condemn and prevent. To permit the wife to accept a void deed and to hold it as a void deed until the exigencies of her husband's affairs are such as to need her protection, and then to give the conveyance validity by simply lodging the void deed for record, is practically to obliterate the statute and to render

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easily possible the very evil which the legislature intended to prevent.

Section 2294 of the code ought to be so construed as to render absolutely invalid any unrecorded deed between the husband and the wife as to all creditors who became such before the deed is recorded, if in fact it does not require a recording of the deed contemporaneously with its execution to give it any validity whatever.

Olin C. Hunt, for appellees.

Conveyances between husband and wife when attacked for fraud are governed by the same rules as conveyances between third persons. *Virden* v. *Dwyer,* 78 Miss., 763; *Tuteur* v. *Chase,* 66 Miss., 476; *Graham* v. *Morgan,* 83 Miss., 601; *Donoghue* v. *Shull,* ante, 404 (s.c., 38 South. Rep., 817).

None but creditors who have obtained a specific right by lien or attachment or otherwise can complain. All the cases cited and relied upon by appellants clearly show this to be true. *Loughridge* v. *Bowland,* 52 Miss., 546; *Kline* v. *Richardson,* 64 Miss., 41; *Johnston* v. *Insurance, etc., Co.,* ante, 234 (s.c., 38 South. Rep., 100).

J. R. Holcomb, and *Harris, Powell & Harris,* on same side.

It will not be denied under the facts in this case that if B. A. Weems had made the deeds in question and filed them for record on July 28th, 1902, the courts would have upheld them as against his creditors, and so the whole question comes down to this: In the absence of actual fraud, does the fact that the deeds were made in December, 1901, and not recorded until July 28th, 1902, render them void as to creditors who had no lien and obtained none until January, 1904?

If the contention of appellants was correct in this case, the wife, receiving a deed from her husband in the utmost good faith, dare not neglect for an instant to put it upon record, for fear that her husband might contract a debt in the interval be-

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tween the giving and recording of the deed. In fact, if their contention is correct, the husband could never convey to his wife at all, because in the nature of things some time must elapse between the giving and recording of the deed, especially where parties live at a distance from the county site; and according to their contention, the deed being void as to all parties in its inception, because not recorded, and its subsequent record not breathing into it the breath of life, the whole thing would be but a sounding brass and tinkling cymbal.

We submit that such a construction would be an absurdity. We submit that the true construction of the statute is, while the deed between husband and wife is not good as to third parties until recorded, that in the absence of fraud after record, such conveyance is good as to all parties not acquiring liens in the meantime. We submit that the following cases are decisive of this point: *Graham* v. *Morgan,* 83 Miss., 601; *Donoghue* v. *Shull,* ante, 404 (s.c., 37 South. Rep., 817); *Johnston* v. *Insurance Co.,* ante, 234 (38 South. Rep., 100); *Loughridge* v. *Bowland,* 52 Miss., 546; *Kline* v. *Richardson,* 64 Miss., 41; *Virden* v. *Dwyer,* 78 Miss., 763.

WHITFIELD, C. J., delivered the opinion of the court.

We think that Code 1892, § 2294, ought to receive, by analogy, similar construction to that heretofore placed on sec. 2457, as regards creditors. In other words, when the "third party" referred to in sec. 2294 is a creditor, that section means that he must be a lien creditor. There would be manifest inharmony of construction if we held, as counsel for appellant contends we should hold, that a mere unsecured creditor is meant by sec. 2294, where the conveyance or transfer is between husband and wife, whilst we hold that sec. 2457 applies only to lien creditors. It is notice by filing for record of deeds which is dealt with by both statutes, and no more in the one case than in the other did the legislature intend to give to a mere general creditor at large the right to avoid a previous conveyance exe-

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cuted for full value and in perfect good faith, as the testimony in this record shows was the case here. It is true that until the deed or transfer from the husband to the wife, or *e converso,* has been filed for record, such conveyance or transfer is invalid as to any "third person," whether creditor, purchaser, or otherwise; but the moment it is filed for record it is to be dealt with in all respects precisely as a trust deed or mortgage filed for record under sec. 2457 is dealt with. The two cases referred to by counsel for appellant (*Gregory* v. *Dodds,* 60 Miss., 549, and *Black* v. *Robinson,* 62 Miss., 68) are not in point. In the latter the creditor was a lien creditor holding a trust deed, and in the other there never was any written transfer even of the furniture. These cases furnish no light in the solution of the question with which we have dealt.

Incidentally it may be noted that this is the first civil appeal from the new county of Lamar, and it may be noted as a pleasant feature that the appeal furnishes the occasion for the first construction of the statute in the particular respect involved.

Affirmed.

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WILLIAM JOHNSON v. STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Murder. Evidence. Other crime. Identity of crime.*
   Where, upon the trial of a murder case, the theory of the state being that defendant procured another to kill deceased, it appeared that the deceased had recently slain the brother of the accused, the trial court did not err in permitting the state to prove that the defendant had thereafter tried to hire a witness to kill deceased and, admitting his malice toward him, expressed his determination to have him killed. Such proof is not incompetent as being evidence of another crime, but is relevant and admissible.

2. SAME. *Instruction.*
   In such case an instruction, authorizing the conviction of defendant "if he counseled, procured, or commanded the killing of deceased," does not constitute reversible error, where it was shown by the record of the conviction of the person who did the killing that he pleaded guilty to the charge of murder and there was no doubt or dispute as to the decedent having been murdered.

3. SAME. *Case.*
   Facts examined and adjudged sufficient to support a conviction of murder.

FROM the circuit court of Lincoln county.

HON. MOYSE H. WILKINSON, Judge.

Johnson, the appellant, was indicted jointly with one Needham Butler for the murder of one Edward Paxton on April 23, 1904. Butler pleaded guilty to the indictment and was sentenced to the penitentiary for life. Johnson, appellant, was tried, convicted, received a like sentence, and appealed to the supreme court. The facts are stated in the opinion of the court.

A. C. & J. W. McNair, for appellant.

There is no claim that appellant Johnson was present at the killing or that he was the party who did the deed. Butler killed defendant. If appellant is guilty, it is as an accessory before

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the fact. The case is one of circumstantial evidence. The only possible motive that can be assigned or attributed to Johnson for the killing of Paxton is the fact that, some months prior to the killing, Paxton had killed appellant's brother. The testimony shows that some short time before the killing of Paxton by Butler, Paxton and Butler met on a public road, and there was a controversy between them, and Paxton threatened to inflict personal injury on Butler. This incensed Butler, and manifestly was the cause of Paxton's death at the hands of Butler.

Without entering into an analysis of the facts relied on to sustain the conviction, we submit that they are wholly insufficient and that a new trial should have been granted. *Algheri* v. *State,* 25 Miss., 584.

All of the testimony of the witness Britt to the effect that Johnson attempted to hire him to kill Paxton was incompetent, and should have been excluded from the jury. Its tendency was to prove that Johnson was guilty of a crime other than that with which he is charged and for which he was being tried. There is no logical connection between that fact and the main fact in issue—the killing of Paxton by Butler and Johnson's connection with it.

The fact that he attempted to employ Britt to kill Paxton does not prove or tend to prove that he procured, counseled, or commanded Butler to do the deed. It sheds no light on, and does not illustrate, the act of Butler or Johnson's connection with him in the killing. It does not follow logically, inferentially, or presumptively that, because he was willing to employ a man of the character of Britt to do the deed, he did or would employ Butler or any one else to do it. The testimony was not admissible to show motive on the part of Johnson to kill or to have Paxton killed. The theory of the state is that the killing of Johnson's brother by Paxton was the motive which animated Johnson. While, probably, it was permissible to prove that fact on the question of motive, surely it cannot be

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said that the futile effort to employ a third party to commit the deed is relevant and admissible to show motive. The facts show that Johnson, at common law, was an accessory before the fact, if guilty, and his motive is immaterial, while the motive of Butler, the acknowledged perpetrator of the crime, is the proper subject of inquiry.

This case falls within the principles announced in *Raines* v. *State,* 81 Miss., 489, and *Dabney* v. *State,* 82 Miss., 252a.

Such testimony as this is dangerous, not only because it requires the accused to meet and explain other acts than those charged against him and for which he is on trial, but also because it may lead the jury to violate the great principle that a party is not to be convicted of one crime by proof that he is guilty of another. 3 Rice on Evidence, sec. 157; *Rex* v. *Ball,* Russ. & R., 132; *Com.* v. *Eastman,* 1 Cush. (Mass.) (s.c., 48 Am. Dec., 596).

J. N. Flowers, assistant attorney-general, for appellee.

The testimony shows that Butler did the killing and that this appellant was not present at the killing. The burden which the state shouldered in this trial was to prove that Johnson was an accessory before the fact, and hence a principal under Code 1892, § 950. There is no question as to the degree of the homicide. The crime itself is not sought to be minimized nor in any way justified. If appellant is guilty of any crime, that crime is murder. He does not deny that a murder was committed; he only insists that he had no hand in it.

And this consideration explains and supports the rulings of the court below, which are complained of here, (1) in admitting the testimony of Eldridge Britt and (2) in giving the one instruction for the state.

Counsel say that the court erred in admitting the testimony of Eldridge Britt. They cite *Raines'* case, 81 Miss., and *Dabney's* case, 82 Miss.

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But in these cases it was attempted to show that the accused had committed other crimes than that for which he was on trial. In the case at bar there was no effort made to show that Johnson had committed any other crime than that for which he was being tried. But the testimony of Britt was offered to show that Johnson had a purpose or design or plan to kill Paxton, and that he was anxious and determined to carry that plan into execution. See Wigmore on Evidence, sec. 102.

Under the facts of this case this testimony seems so clearly competent we think it merits no special attention. It is referable to the principle of law which justifies the admission of proof of threats. In fact, it is worth more as proof than testimony as to threats, because it not only shows the existence of malice which was being carefully nursed and of a deliberate purpose to kill, but it also shows that this purpose was a design, a plan, and that it was being put into active operation.

TRULY, J., delivered the opinion of the court.

The testimony for the state, which was accepted by the jury as true, is sufficient to warrant their finding and sustain the conviction. It was shown that the deceased, Edward Paxton, only a short time before the homicide, had himself slain the brother of the appellant, and there was then pending against him a prosecution growing out of the killing. The existence of bad feeling between appellant and deceased was proven, and it was also shown that appellant entertained such a deep degree of malice that only a short time before this homicide he had endeavored to hire the witness Britt to assassinate Paxton, offering as inducement $25 in money and a horse of the value of $100; that at the same time, when Britt refused, he had made threats, and stated his intention of hiring some one else to kill Paxton. It further appeared that Butler, the party who actually shot Paxton, was an intimate associate of and had been reared in the same family with the appellant; that the appellant had purchased the rifle and cartridges with which the homicide was

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committed, only a few days before the killing, and had had the same charged to the account of his sister-in-law, whose husband Paxton had killed, and had secretly delivered the same to Butler. On the day of the homicide, and after its commission, appellant came to the town, some nine miles distant, and brought with him clothing for Butler, which Butler wore in making his escape from the state; that he met with Butler at his sister's house, delivered the clothes to him, was seen counting out money in the room where Butler was and where the rifle was found hidden, and was heard to say to Butler that he desired him to get away at once. All this, if true, taken into consideration with other incriminating circumstances, shows such a guilty foreknowledge of and counseling and procuring the commission of the actual homicide as precludes us from disturbing the finding of the jury on the facts.

The testimony of the witness Britt, detailing a conversation which he averred occurred a few days before the homicide between appellant and himself, in the course of which appellant admitted the malice which he bore toward Paxton on account of the killing of his brother and the subsequent conduct of Paxton, and endeavored to procure the witness' service in the assassination of Paxton, and expressed a determination to have Paxton killed, was clearly admissible. It is an elementary principle that the acts, conduct, and words of a party accused are admissible in all cases where they tend to show either a motive for the commission of the crime or evince malice toward the party afterwards killed. The testimony here under review proved both malice and motive. We can add nothing to the admirable exposition of the principle controlling and permitting the admission of such testimony, contained in the opinion of this court rendered by Cooper, C. J., in *Story* v. *State,* 68 Miss., 609 (10 South. Rep., 47). The testimony here under review does not fall within the condemnation of the cases cited by counsel for appellant. This was in no sense proof of another and different substantive crime on the part of appellant, but was

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relevant testimony tending to show his connection with the murder for which he was then on trial. Testimony relevant in itself will not be excluded because it may incidentally disclose another offense, or show that the accused endeavored to procure the commission of another crime.

The instruction for the state, as an abstract proposition of law, is erroneous, in that it authorizes the jury to convict the appellant of murder if he "counseled, procured, or commanded the killing of Paxton," without stating that such "killing" must itself be murder. But under the facts of the instant case the error was not fatal or material, for the reason that there was no doubt or dispute as to the grade of the crime committed in the slaying of Paxton. The facts and circumstances disclosed by the record show that Paxton was waylaid and assassinated in cold blood. Again, it is admitted in this case, and so distinctly shown in the record, that Butler, the person who actually killed Paxton, had pleaded guilty to murder, and the record of that conviction was by consent admitted upon the trial of appellant. This cured any possible defect which existed in the instruction on account of the abstract form in which the legal principle was stated.

Affirmed.

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HARRISON COUNTY ET AL. v. WILLIAM O. ROGERS ET AL.
MOTION.

1. APPEAL. *County. Exemption from bond. Code* 1892, § 93. *Demurrer overruled. Code* 1892, § 33.

   Where a county prayed for and obtained an appeal without bond, as authorized by Code 1892, § 93, from a decree overruling its demurrer to a bill in equity, under Code 1892, § 33, authorizing an appeal from such a decree, if applied for and perfected within a limited time, the appeal is perfected, within the statutory time limit, where a citation in error was sued out and served within such time.

2. SAME. *Lapse of time. Motion to docket and dismiss. Failure of appellee to make.*

   An appellee who has been served with a citation in error cannot, after the transcript of the record is filed in the supreme court, complain of the lapse of time less than will bar an appeal (two years, Code 1892, § 2752), between the taking of an appeal and the filing of the transcript in the supreme court, if he failed during such time to appear and move to docket and dismiss the cause. *Houston* v. *Witherspoon*, 68 Miss., 188.

FROM the chancery court of Harrison county.

HON. STONE DEAVOURS, Chancellor.

Rogers and others, appellees, were complainants in the court below; Harrison county and Joseph T. Jones, appellants, were defendants there. Both defendants demurred to the complainants' bill, each filing a separate demurrer. The chancellor, in vacation, April 5, 1904, overruled both demurrers, and on that day granted a separate appeal to each defendant; the order granting the county's appeal specifically exempted it from giving bond, as authorized by Code 1892, § 93. Jones gave bond speedily, and the county, April 26, 1904, twenty-one days after the allowance of the appeal, sued out a citation in error, and caused it to be served on that day. The next return day in the supreme court after the granting of said appeal for the second

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or southern district was, as fixed by the court, the third Monday of April, 1904. The transcript of the record in the cause was not filed in the supreme court until the 15th day of September, 1904; but the appellees had wholly failed to enter their appearance in the supreme court before that time, and they did not appear until after that date. They did appear at the November term, 1904, and on the 22d day of March, 1905, made this motion to dismiss Harrison county's appeal because, as was averred in the motion, "it was not taken and prosecuted in the manner and within the time prescribed by law."

[For the decision of the case on the merits, see *Jones et al.* v. *Rogers et al.*, post.]

Harper & Harper, for the motion.

N. G. Evans, Jr., Bowers & Neville, and *McWillie & Thompson,* contra.

Argued orally by *A. Y. Harper,* for the motion, and by *R. H. Thompson,* contra.

WHITFIELD, C. J., delivered the opinion of the court on the motion.

Counsel for the motion concedes that *Houston* v. *Witherspoon,* 68 Miss., 188, 190 (8 South. Rep., 515), would be conclusive against him if there was a motion to dismiss the appeal as to Jones. But he still insists that as to Harrison county no valid appeal ever was perfected by the county, because no bond was given in thirty days. But the statute (§ 93, Code 1892) expressly exempted the county from giving any bond. The county petitioned for the appeal April 5, 1904. The appeal was granted same day, expressly exempting the county from giving bond. The county had citation issued April 26, 1904, and served on appellee, and, the county having thus done all that the law required, the appeal was duly perfected.

The motion must therefore be, and it is, denied.

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JOSEPH BUCK ET AL. v. CITY OF MACON.

DEED. *Condition subsequent. Forfeiture. Nonuser.*

A deed conveying land to trustees of a township for school purposes, and for no other use, is not forfeited by a nonuser for two and one-half years, even if the deed be assumed to be upon a condition subsequent.

FROM the chancery court of Noxubee county.

HON. JAMES F. MCCOOL, Chancellor.

Buck and others, appellants, were complainants in the court below; the city of Macon, the appellee, was defendant there. From a decree sustaining a demurrer to the bill complainants appealed to the supreme court.

The bill alleged that complainants are the heirs of David Buck, who owned the land in controversy; that their ancestor, on the 25th day of May, 1844, executed a conveyance to the trustees of township 15, range 17, on which the city of Macon is located, conditioned that it was for the use of a school, and no other use; that the land so conveyed was in the city of Macon; that said trustees took possession of the land, and occupied it and used it for school purposes continuously until about the 1st of November, 1901, when it was abandoned for such purposes, and a new public school building was erected by the city in another part of the municipality. The bill then avers that complainants demanded possession of the land, and that defendant, the successor of the aforesaid trustees, declined to recognize their claim and refused to give them possession. The prayer of the bill is that the claim of the city of Macon be canceled, as a cloud on their title.

Brame & Barnes, for appellants.

George Richardson, and *J. E. Rives,* for appellee.

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CALHOON, J., delivered the opinion of the court.

This record is based on a bill of appellants to remove an alleged cloud from their title, which title they ground on a forfeiture of a condition in a conveyance by their ancestor to school trustees, by reason of which forfeiture they say the title to the lot reverted to them. The forfeiture they aver was because of the abandonment of the use of the property for school purposes. The conveyance is as follows (italics ours):

"Know all men by these presents that I, David Buck, for the consideration of *one dollar* to me paid in hand by William McLeod, William D. Lyles, and Hines H. Colbert, trustees of the 16th section, T. 15, R. 17, in said (Noxubee) county, and for the *good will and wishes* I have for the *inhabitants of said township*, do hereby grant, bargain, sell, and convey unto the said trustees the following described lots, or parcel of ground [describing them], *for the use of a school and no other use.*

"To have and to hold the premises with the appurtenances to them the said trustees and *their successors* in office for *their use and behoof* forever; and for myself and my heirs, do hereby *warrant* and will forever defend the same to the *said trustees and their successors in office* against the lawful claims of all persons whomsoever."

The bill charges that the city of Macon, "through the trustees of the public school has been using and occupying said property continuously for school purposes up to and until about the 1st day of November, 1901, when it abandoned the same for such purposes, and occupied a new school building," erected by the city on another lot, and that "since that time the lot has not been used or occupied" by any other school. This bill was filed April 25, 1904, about two years and a half after the date of the alleged abandonment, and there is no averment that the property has actually been put to any other use than for schools.

Even if the words in the deed, "for the use of a school and no other use," constituted a condition subsequent, which, upon breach, produced a forfeiture authorizing reëntry by the grantor,

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which we do not now decide upon, we decline to hold that mere nonuser for two and one-half years worked a forfeiture. *Curtis* v. *Board,* 43 Kan., 138 (23 Pac., 98); *Gage* v. *School Dist.,* 64 N. H., 232 (9 Atl., 387); *Rowe* v. *City,* 49 Minn., 148 (51 N. W., 907); *Rawson* v. *Inhabitants,* 7 Allen, 125 (83 Am. Dec., 670); *Episcopal, etc.,* v. *Appleton,* 117 Mass., 326; *City* v. *Terwilliger,* 16 Or., 465 (19 Pac., 90); *Farnham* v. *Thompson,* 34 Minn., 330 (26 N. W., 9; 57 Am. St. Rep., 59); *Packard* v. *Ames,* 16 Gray (Mass.), 327; *Horner* v. *Chicago, etc.,* 38 Wis., 165; *Scantlin* v. *Garvin,* 46 Ind., 262; *Indian Orchard, etc.,* v. *Sikes,* 8 Gray (Mass.), 562; *Cassidy* v. *Mason,* 171 Mass., 507 (50 N. E., 1027); *Sohier* v. *Trinity Church,* 109 Mass., 1; *Cross* v. *Carson,* 8 Blackf., 138 (44 Am. Dec., note on page 744); *Wilkes-Barre* v. *Wyoming, etc.,* 134 Pa., 616 (19 Atl., 809); *Woodruff* v. *Woodruff,* 1 L. R. A., 380, and notes; *Post* v. *Weil,* 5 L. R. A., 422, and notes; 13 Cyc., 669, 683, 689, 699, 701; 6 Ency., 506, *et seq.* These authorities, and the citations to be found in them, give, we believe, the whole of the law bearing upon the nature and *quantum* of the estate conveyed by the deed before us; and it is enough to say that they fully sustain our decision as indicated, beyond which we do not now go.

Affirmed.

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TRISTRAM R. ROSAMAN *v.* CITY OF OKOLONA.

CRIMINAL LAW. *Carrying concealed weapons. Traveler. Code* 1892, §§ 1026, 1027. *Okolona ordinance.*

A person ceases to be a traveler, within the meaning of a city ordinance, substantially the same as Code 1892, §§ 1026, 1027, making it a misdemeanor to carry a deadly weapon concealed, but excepting those traveling, etc., when he reaches the point of his destination and engages a room at a boarding house or hotel, intending to stay an indefinite time and to return home only after the business for which he made the journey is completed.

FROM the circuit court of, second district, Chickasaw county. HON. EUGENE O. SYKES, Judge.

Rosaman, the appellant, was tried and convicted in the mayor's court of violating an ordinance of the city of Okolona forbidding the carrying of deadly weapons concealed. He appealed to the circuit court, where he was tried *de novo* and again convicted, whence he appealed to the supreme court. The city ordinance is and was in the following words—viz.:

"*Be it further ordained,* That any person (not being threatened with or having good and sufficient reason to apprehend an attack, or *traveling*—not being a tramp—or setting out on a journey, or peace officer, or deputy in discharge of his duties) who carries *concealed,* in whole or in part, any bowie knife, brass or metallic knuckles, or other deadly weapon of like kind or description, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine not exceeding one hundred dollars and, in the event the fine and costs are not paid, shall be required to work at hard labor upon the streets of the city of Okolona under the direction of the marshal of said city not exceeding two months, and for the second or any subsequent offense shall, on conviction, be fined not less than fifty dollars nor more than one hundred dollars, and, if the fine and costs are not paid, be condemned to hard labor, as above provided; and in any pro-

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ceeding under this section it shall not be necessary for the city to allege or prove any of the exceptions herein contained, but the burden of proving such exceptions shall be on the accused."

The other facts necessary to an understanding of the case are stated in the opinion of the court.

A. T. Stovall, for appellant.

The facts are clear and undisputed that the defendant was traveling, and not a tramp. Code 1892, § 1027.

That defendant was traveling in the usual and ordinary sense of the word there can be no doubt, especially in view of the definition or construction put upon the word "traveling" by this court in *McGuirk* v. *State,* 64 Miss., 209; *Haywood* v. *State,* 66 Miss., 402. It is also in line with the definition given by the Standard Dictionary and the Century Dictionary and Encyclopedia.

Surely this defendant was "beyond the circle of his friends and acquaintances;" and if he was, he was traveling, and so entitled to carry a concealed weapon.

The privilege given by the statute to carry a weapon concealed about the person when traveling begins when one is setting out on a journey, and continues until he reaches home, or the end of the journey. *McGuirk* v. *State,* 64 Miss., 209; 5 Am. & Eng. Ency. Law, 743, 744.

This defendant had not reached his home, nor had he ended his journey.

L. P. Haley, for appellee.

Defendant was not setting out on a journey. He had come into the state and had stopped for several days and had put his pistol away. The day before he was to set out on the contemplated journey he armed himself, "because he did not know what they were going to do with him," and not because he was going to set out on a journey. *McGuirk* v. *State,* 64 Miss., 212.

It is a question of fact for the jury whether a traveler con-

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tinues as such during a stop-over. *Carr* v. *State,* 34 Ark., 448. This entire question is fully considered in 5 Am. & Eng. Ency. Law (2d ed.), 743, 744, 745.

CALHOON, J., delivered the opinion of the court.

The city of Okolona had, as it legally might have, an ordinance denouncing a penalty against carrying concealed weapons, and under it Mr. Rosaman was convicted. It is immaterial to determine whether the court erred in permitting the prosecution to ask accused, as a witness, whether he had not pleaded guilty in the mayor's court, because his own testimony in the circuit court clearly establishes his guilt. According to his testimony, he was a non-resident of this state, and came to Okolona for the purpose of employing hands for a railroad company. He arrived in Okolona on Friday evening, with a pistol on his person, took board and lodging at a hotel, and carried the pistol on his person the next day, Saturday, until noon, when he put it under his bedclothing. On Sunday morning officers came to arrest him for enticing away laborers, and he then put the pistol on his person and went with them to the jail. The defense of being a traveler to defeat this prosecution cannot avail the appellant in this case. He had the right to carry his pistol to Okolona, which was his point of destination, and might be regarded as a traveler until he reached his room. But, in our opinion, he was not a traveler during the forenoon of Saturday, when he did carry the pistol on his person. His stay in Okolona was of uncertain duration; and if he had the right to carry the concealed weapon, so may every man on a journey carry one in any city or town for an indefinite period, until he shall have finished his business at the place, even though it should require weeks or months. *McGuirk* v. *State,* 64 Miss., 212 (1 South. Rep., 103); *Wilson* v. *State,* 81 Miss., 404 (33 South. Rep., 171).

Affirmed.

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GULF & SHIP ISLAND RAILROAD COMPANY v. WILLIAM C. ELLIS.

RAILROADS. *Cattle guards. Code* 1892, § 3561. *Interior crossings.*

Where a railroad company constructed a sufficient stock gap and cattle guard, both where its track entered and where it passed out of enclosed lands, used as one tract and belonging to one person:

(*a*) It complied with Code 1892, § 3561, making it the duty of every railroad company to construct and maintain all necessary or proper stock gaps and cattle guards where its track passes through enclosed land; and

(*b*) It cannot be required to construct other stock gaps or cattle guards at a place within the enclosure where it had, for the convenience of the owner, constructed a crossing over its track.

FROM the circuit court of Rankin county.

HON. JOHN R. ENOCHS, Judge.

Ellis, the appellee, was plaintiff, and the railroad company, the appellant, defendant in the court below. From a judgment in plaintiff's favor the defendant appealed to the supreme court.

The suit was for the statutory penalty imposed on railroad companies by Code 1892, § 3561, for a failure to construct and maintain all necessary or proper stock gaps and cattle guards where their tracks pass through enclosed lands, which statute is in the following words:

"3561. *Stock gaps and cattle guards.*—It is the duty of every railroad company to construct and maintain all necessary or proper stock gaps and cattle guards where its track passes through enclosed land, and to make and maintain convenient and suitable crossings over its track for necessary plantation roads. For any failure so to do the railroad company shall be liable to pay two hundred and fifty dollars, to be recovered by the person interested."

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The railroad company had constructed and maintained a sufficient stock gap and cattle guard where its track entered the enclosed land on the north, and also where it passed out of the enclosure on the south. It had, at plaintiff's request and for his accommodation, constructed a crossing over its track and through its wire fences at a point within the enclosure. The complaint was that one of the cattle guards placed by the railroad on the sides of this interior crossing was defective, and permitted cattle to pass over it.

McWillie & Thompson, and *Jas. H. Neville*, and *E. J. Bowers*, for appellant.

Under the undisputed testimony in this case, construing it most favorably for the plaintiff, the railroad company was not required to maintain a cattle guard or a stock gap at the interior crossing. Code 1892, § 3561, makes it the duty of every railroad company to construct and maintain all necessary and proper stock gaps and cattle guards where its track passes through enclosed land, and to make and maintain convenient and suitable crossings over its track for necessary plantation roads. In the case now before us the railroad company maintained a proper stock gap and cattle guard where its track entered the plaintiff's enclosed land and where it departed therefrom. This was a full, complete, and perfect compliance with the section of the code under consideration touching the construction of stock gaps and cattle guards. The railroad company was required to make and maintain a necessary crossing over its track for necessary plantation roads, and if a pasture be considered and treated as a part of a plantation, it was necessary for the railroad to maintain the crossing located in plaintiff's pasture, but the statute does not require that stock gaps or cattle guards should be maintained on either side of such crossing. The statute is a penal one. It should be and, of course, will be strictly construed. If the case be one for which the legislature should have provided, that makes no difference,

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because this court is not a law-making body. The case before the court does not fall within any one of the many decisions which have construed the statute in question. It is somewhat unique in its facts, and, we submit, is clearly without the terms of the statute. This being true, the peremptory instruction asked should have been given for the defendant, but certainly the instructions given at the plaintiff's request ought to have been denied.

S. L. McLaurin, and *A. G. Norrell*, for appellee.

Counsel for appellant contend that a railroad company is never required to build more than two stock gaps on one man's land, one at either end, and that, Ellis having testified that the stock gap at the crossing is the one sued for, he has no right to recover in this suit for a failure to maintain any other stock gap.

Upon the first proposition we submit that in some cases it may be necessary for the railroad to build as many as half a dozen stock gaps on the same tract of land. Suppose one man owns a full section of land with a cross fence through the middle, is he not entitled to have a stock gap where this cross fence crosses the railroad? If not, how could he ever have any cross fence on his land? Surely the cross fence would be worth nothing to him if he could not get a stock gap, for without the stock gap cattle could go from one field into the other. In the present case the plantation crossing was necessary. *Odeneal* v. *Railway Co.*, 73 Miss., 34. It therefore follows that a stock gap on either side of the crossing was necessary. The railroad considered it necessary, because they had maintained some kind of a pretense of a stock gap there from the time the railroad was built.

The scope and extent of the suit is to be determined by the declaration, and not by the testimony; and in this case the suit is for failure to make and maintain necessary stock gaps on the land described in the declaration, and if the cattle could go out over the stock gap at the crossing on to defendant's right of

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way and thence on the land of others, it is manifest that the company did not maintain the necessary stock gaps, and the court might well have given a peremptory instruction for the plaintiff.

The necessity for the stock gap where the plantation road crosses the railroad in the pasture in this case is, in our opinion, beyond question. The Gulf & Ship Island Railroad Company undoubtedly so considered it, as they had kept some kind of a pretense of a stock gap at that point since the date of the construction of the railroad. Undoubtedly it was the duty of the railroad to make and maintain such stock gaps and cattle guards that when Ellis would turn his cattle into his pasture they could not leave the pasture over the railroad stock gap and cattle guard.

Counsel for the railroad company undertook by the testimony to confine Ellis in his suit to the one stock gap at the plantation crossing, and this because they asked him if this was the stock gap he was suing for, and he answered in the affirmative. From the declaration it is to be ascertained what the suit is brought for, and not from the testimony. Plaintiff sues for the failure to make and maintain suitable and convenient stock gaps and cattle guards on the land mentioned in the declaration, and if the proof shows that any necessary stock gap is not maintained, the plaintiff would be entitled to recover.

WHITFIELD, C. J., delivered the opinion of the court.

There may be cases in which it would be the duty of a railroad company to construct and maintain more cattle guards than one where the railroad enters upon, and one where the railroad makes its exit from, an inclosed tract of land. The statute does not specify the number. There might be a very large body of land, lying on both sides of the railroad track, many thousand acres in extent, the property of one owner; and this body of land might be subdivided into half a dozen cultivated farms, and interspersed between them might be half a dozen pastures,

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and the cultivated land might be divided from the pastures by cross fences intersecting the railroad. In such cases, doubtless, it would be the duty of the railroad company to construct and maintain proper cattle guards where each of such cross fences intersected the railroad track. Of course this qualification must attach even in such cases—that is to say, that the subdivision should be made in good faith, and not simply to make a case for penalties against a railroad company. But the difficulty with appellee's case is that no such state of facts is shown by this record. So far as this record discloses, there is just one body of land involved, one hundred and fifty acres in extent, around where the railroad enters upon and leaves the inclosed land. And the whole of this land on both sides of the railroad track is pasture land. Somewhere about the middle of the pasture, the railroad, for the convenience of the appellee, constructed a crossing, never used as a wagon road, but intended simply for passage of the cattle from one part of the pasture to the other over the railroad track. At the place where this crossing was, the railroad also erected cattle guards, and it is the northernmost one of these two interior cattle guards which is complained of here as insufficient. So far as this record discloses, the northernmost and southernmost cattle guards are sufficient. There is no proof whatever that the cattle guard at the extreme northern end of the pasture is not entirely sufficient. Judging from the brief of appellee, it would seem that the purpose was to have shown this cattle guard to have been insufficient, but there is no such proof. Counsel for appellee insist that the declaration must show what is claimed. Granted; but the declaration must be supported by proof, and the only proof of any insufficiency in any cattle guard in this case is as stated above.

Reversed and remanded.

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EUGENE FLOWERS v. STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Evidence. Direct evidence in rebuttal.*
   In homicide, after the defense has rested, it is error to admit testimony for the state which is not in rebuttal of that for the defendant, but direct, in the absence of a showing that it came to the state's knowledge after the conclusion of its evidence.

2. SAME. *District attorney as witness. Practice.*
   In homicide it is error to permit a district attorney, who has been improperly allowed to introduce the direct testimony of a witness offered in rebuttal, to fortify the testimony of such witness by that of himself in relation to and explanatory of previous statements made by the witness; and such error is not cured by the subsequent exclusion of the district attorney's testimony.

3. SAME. *Right of defendant. Unfair restrictions.*
   It is error in homicide, after improperly admitting in rebuttal direct testimony for the state as to dying declarations, to exclude testimony for the defense in conflict therewith.

FROM the circuit court of Copiah county.

HON. DAVID M. MILLER, Judge.

The appellant, Eugene Flowers, was convicted of the murder of George Jones, and the jury fixed his punishment at life imprisonment in the penitentiary. From the judgment sentencing him accordingly, he appealed to the supreme court. The opinion states the facts of the case.

M. S. McNeal, and *Harris, Powell & Harris,* for appellant.

In this case, after the state had introduced its testimony and rested, the defense introduced several witnesses, who clearly established the fact that he acted in self-defense. After the defense had rested, the state for the first time, in order to bolster up its case, introduced what purported to be a dying declaration by the deceased George Jones, claiming that his testimony was

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introduced by way of rebuttal of the testimony of Richard Brown, a witness for the defendant.

The court will readily see, from an inspection of the record, that this dying declaration was not in rebuttal of Richard Brown's testimony, but was really evidence in chief. Appellant objected to the introduction of this testimony at the time, and moved to exclude it, but the court overruled this motion. After the dying declaration had been allowed to be introduced and the case thus reopened by the state, appellant requested the privilege of introducing further eyewitnesses to the killing, which the court refused to allow him to do.

We contend for appellant that, the state and defense having rested, it was bad practice, at least, and very unfair to the defendant, to allow this dying declaration to be introduced; but if the case was reopened by the state, in all fairness the same privilege should have been extended to the defendant. The practice of holding back testimony by plaintiff and introducing it at the last, after the defendant rested, is condemned by this court, even in civil cases. *Jamison* v. *Moseley,* 69 Miss., 485.

But this is not the worst feature connected with the admission of this dying declaration. Charlie Bass, upon whose testimony the dying declaration was established, on cross-examination stated that he was present when the case was tried on *habeas corpus* by the chancellor. He was questioned by the counsel for the defense on the very day of the present trial, and yet never opened his mouth about any dying declaration having been made; on the contrary, he stated that he knew nothing of the case. To bolster up this witness, the district attorney took the stand, and, over the objection of the defendant, testified that this witness, Charlie Bass, had told him the same thing he had told the counsel for the defense, and that in truth and in fact Charlie Bass did not know that the dying declaration was testimony.

The district attorney's testimony was afterwards ruled out by the court, but the damage had been done, and his witness had

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been supported by his testimony. This was manifest error, as shown in the case of *Chism* v. *State,* 70 Miss., 742; *Johnson* v. *State,* 80 Miss., 798; and *Ely* v. *Railroad Co.,* 83 Miss., 519.

The court again erred in this: After the testimony in regard to the dying declaration had been admitted over the objection of defendant, the defendant again moved to exclude such testimony; the court overruled this motion, except as to the testimony of Richard Jones, and ruled out his testimony. Bass, witness for the state, had testified that Richard Jones was present when the dying declaration was made. This Jones was the father of the dead man, and he himself testified that he was present with his son before he died, but he further testified that no dying declaration was made. So the result of the court's ruling on defendant's motion to exclude the dying declaration and testimony in regard to it was that all such testimony as favored the state was retained, and the only part of it which favored the defendant was excluded; the defendant asked for bread, and was given a stone. This was manifest error.

Again, all of John Lynch's testimony was ruled out except that portion of the statement in which he says that deceased said, "If my gun had fired, I would have killed Jean." This was clearly improper.

William Williams, attorney-general, for appellee.

Dying declarations are treated as other testimony. They may be impeached in any of the modes by which the evidence of the declarant could have been impeached had he been alive and testifying upon the witness stand. 10 Am. & Eng. Ency. Law (2d ed.), 386.

The credibility of dying declarations is determined largely by the same rules that are applied to other testimony. 10 Am. & Eng. Ency. Law (2d ed.), 386.

Persons whose declarations are admitted as dying declarations are considered as standing in the same situation as if they were sworn. If the declarant, if living, would have been a

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competent witness, his declarations are admissible; if he would have been incompetent to testify, his declarations are inadmissible. 1 Greenleaf on Evidence (15th ed.), 227; Wharton's Cr. Ev. (9th ed.), 218.

Since a dying declaration is competent evidence and stands in lieu of the declarant, if living, it may be introduced at any stage in the trial at which the declarant, if living, could be introduced as a witness to testify. It may be dealt with relative to the order of introduction just as if it were a living witness or any other kind of proof.

The trial court has, in the interest of justice, a broad discretion in the order in which proof may be made, and unless it is manifest that such discretion has been abused, its action will not be disturbed. *Cargill* v. *Commonwealth,* 93 Ky., 580.

The order of testimony is a matter which must necessarily be left largely in the judgment of the trial courts, and unless a clear case of abuse is shown, it is no ground for reversal. *State* v. *Murphy,* 118 Mo., 15; *Webb* v. *State,* 29 Ohio, 356; *Moore's Case,* 96 Tenn., 216; *Winterton* v. *Railroad Co.,* 73 Miss., 836.

The state made out a clear case of murder without the dying declaration, and rested. The defendant offered testimony to show that the deceased was the aggressor in the difficulty in which he was killed. The state offered in rebuttal to this testimony the declaration of the deceased made just prior to his death.

The state having introduced testimony to show appellant to be the aggressor in the difficulty, it is submitted that it is almost impossible to conceive a more manifest instance of rebuttal than is here presented. *Moseley* v. *Jamison,* 66 Miss., 52.

"That evidence which is given by a party in the cause to explain, repel, counteract, or deprive facts given in the evidence on the other side" is rebutting evidence. 2 Bouvier's Law Dictionary, 830.

As a general rule, anything may be given as rebutting evidence which is a direct reply to that produced on the other side.

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Counsel merely assumes that the evidence objected to was not rebutting in its character, but original. *People* v. *Page,* 1 Idaho, 195; *Marshall* v. *Davies,* 78 N. Y., 420; *O'Donnell's Case,* 12 Pac. Rep., 747.

It was not error for the court to refuse to permit counsel for appellant to introduce testimony in surrebuttal which had been introduced by him before he closed his case. Counsel attempted to prove by witness Norah Brown the same facts which were testified to before the case of appellant was closed. The effect of this would have simply been to scotch witnesses who had testified before the state offered evidence in rebuttal.

Norah Brown was in court, and should have been introduced, if at all, before the defendant closed his case. *Jackson* v. *State,* 64 Ga., 344.

The dying declaration was introduced at the proper time, it was in rebuttal to the testimony introduced by the defendant, and the defendant was permitted to rebut same.

Argued orally by *Robert Powell,* and *M. S. McNeal,* for appellant, and by *William Williams,* attorney-general, for appellee.

CALHOON, J., delivered the opinion of the court.

Flowers was convicted of murder in what the record evidence shows to be a very close case. The state rested on the testimony of a single witness, Lula Bass. The pith of her statement is that she was on her way to the house of one Rich Brown, whom she overtook, and with whom she walked on until the two came to where appellant and deceased were. They seemed to be "fussing," and Brown told them to "quit that foolishness," and told George Jones, the deceased, to come on with them; that deceased came on behind them to Brown's house, but did not go in with them, but stopped at the gatepost, laid his gun, a breechloader, on the gatepost "with his hands across it." She then proceeded to say that "after a while Jean [the accused] came

on down, and had his pistol half in his hand and half in his pocket," and walked by the deceased, walked to where witness was, and then back to deceased, and then she heard deceased say, "If you lay down a quarter, I will pick it up," when accused shot him, firing twice; and that after he was shot, and not before, the deceased tried to get his gun up as if to shoot, but could not. This testimony, if believed by the jury, would warrant conviction. The defense then introduced three witnesses, whose testimony, if believed by the jury, made out a clear case of self-defense, and rested. One of these witnesses—Rich Brown—testified that deceased came on behind him (the appellant) at a distance of fifty yards, cursing the appellant, and, with his gun in his hand, came into his yard, and snapped his gun at Flowers, broke it down and put in another cartridge, and as he threw it up again, Flowers shot his pistol; that the appellant fired his pistol three times; and that the witness Lula Bass was placed where she could not have seen these acts. Only one shot struck deceased. Thereupon, when the defense rested, the state introduced, for the first time, one Charlie Bass, a witness stated to be in rebuttal of Rich Brown. Bass testified, over objection, that he saw the deceased an hour before he died, and deceased said he was going to die; that he made no attempt to shoot appellant; that appellant shot him for nothing, about an honest quarter that he (appellant) owed deceased, and deceased was not doing anything. On cross-examination Bass stated that he had told the district attorney about this testimony, without stating when he told him or where he told him. The state's attorney here took the stand as a witness, and testified, over objection, that the witness Charlie Bass had told him that he knew nothing of the case, and that he then asked Bass if he was with deceased when he died, and Bass said he was, and then the state's attorney testified that Bass did not know that that was evidence. This evidence of dying declarations was in no sense in rebuttal. It was direct testimony, and of a nature which generally has very great effect on ordinary jurors; and this

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permitting of direct testimony in rebuttal is condemned as very bad practice in this state and everywhere, though we are not prepared to say that we would reverse for this alone. Direct testimony should not be permitted to be produced in rebuttal unless there is some statement that it came to the knowledge of the party after the conclusion of the testimony, and there is nothing here to show this. We think, however, that it was clearly error to permit the state's attorney to testify in order to bolster up his witness. This gave the defendant in this close case too heavy a burden to bear. It is true the court excluded this testimony of the state's attorney, but it was too late; it had had its effect on the jury. The state then introduced Meredith Alexander, who testified that the deceased said that he was killed for nothing, for an honest quarter which appellant owed him. The state then introduced Rich Jones, who testified that he was present when George Jones died, and that "'long toward the last" George said he could not stand it, and the witness supposed from that he was going to die, but he did not say anything about his going to die. The defense then asked the court to instruct the jury that all the testimony in regard to the dying declarations was not to be considered as evidence, because the proper foundation was not laid and because it would improperly admit in rebuttal direct testimony; and the court sustained the motion only as to the testimony of Richard Jones, but overruled it as to the testimony of the other witnesses.

It will thus be seen, in sustaining the motion only as to the testimony of Richard Jones, who was the father of the deceased, and was with him when he died, and who had testified that he did not know whether George knew he was going to die or not, the court in fact excluded only that part of the testimony which might be of advantage to the defendant; and this was error.

Here the state rested, and the defense introduced John Lynch as a witness, who testified that while deceased was lying on the ground where he was shot, Rich Brown's wife, mother of the deceased, told the deceased he had brought all this trouble

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on himself; that she had tried to get him to go home, and he would not go; and told him that, if he had listened to her, he would not have been in this trouble; and he said: "Yes, if my gun had fired, I would have killed him." Here, on motion by the state, the court excluded all that this witness said except the answer that was made by the deceased, that, "If my gun had fired, I would have killed him." We think this was error. The court should have excluded all or none of it. The whole colloquy should have been admitted or none of it. It was necessary to show the relevancy of his statement about the gun. If part of the *res gestae*, all was admissible.

The defense then introduced Norah Brown, who was brought on in surrebuttal of the statements made by the dying man to Charlie Bass, and, the jury being retired, it was proposed to show by Norah that she saw the dead man before he was shot, and that he was cursing and quarreling inside of the yard at the post, when right here the state objected to the testimony, and the defense told the court that it expected to prove by this witness, in rebuttal of the dying declarations, that the deceased was the aggressor in the difficulty, and that he raised his gun to shoot the defendant before the defendant ever fired. The court sustained the objection, but permitted the defendant to show by this witness anything in rebuttal of what the state had offered in rebuttal only. This was error. The court had permitted the testimony as to the dying declarations as in rebuttal, when it was clearly direct testimony, and, having done this, it was unjust to the prisoner to hold him down to the strict rules of practice. If the dying declarations had been offered originally, the defense would not, perhaps, have offered this last witness.

Reversed and remanded.

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HINDS AND ADAMS COUNTIES *v.* NATCHEZ, JACKSON & COLUMBUS RAILROAD COMPANY ET AL.

1. CORPORATIONS. *Sale of franchise. Purchaser. Want of legislative power. Stockholders.*

   Where a corporation, being authorized to sell, sells its franchise to another corporation, the stockholders of the seller cannot avoid the sale because of the want of power in the purchaser to buy.

2. SAME. *Railroads. Laws* 1890, *ch.* 502, *p.* 675. *Natchez, Jackson & Columbus Railroad Company. Power to sell.*

   The Natchez, Jackson & Columbus Railroad Company was empowered, under Laws 1890, ch. 502, p. 675, to sell its railroad franchises and property by a vote of a majority of its stockholders without the consent of the minority.

3. SAME. *Stockholders. Power of majority. Sale.*

   A private corporation, doing an unprofitable business, may sell its entire assets upon a vote of the majority of its stockholders, even in the absence of an express enabling statute; and with such a statute the majority may sell all of the assets of an insolvent public corporation.

4. SAME. *Counties. Consenting to sale of stock.*

   A county which owned a majority of the stock of a railroad for eleven years, and, with another county, controlled the road for five years longer, and which was represented by the president of its board of supervisors at every meeting of the stockholders during the entire period, and participated, through its representative, in the issuance, hypothecation, and sale of stock to a certain person, could not question the validity of the stock so issued, in the hands of its holder.

5. SAME. *Meetings. Minority bound by acts of majority.*

   A stockholder in a corporation is bound by the act of a majority where due notice of a stockholders' meeting was given, although he was absent and unrepresented at the meeting.

6. SAME. *Counties. Railway stocks. Non-governmental capacity.*

   Counties which issue bonds for railway stock do not own and hold the stock in a governmental capacity, but hold it in the same way and subject to the same rights and obligations as private corporations and individuals.

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7. SAME. *County appointing director. Estoppel.*

A county which holds stock in a railroad under a contract of subscription, giving it the right to be represented in the directorate, and which appoints a representative to act as director, is bound by the action of its representative in participating at a directors' meeting in a sale of the corporation's franchise and assets, and is estopped to repudiate such action.

FROM the chancery court of, first district, Hinds county.

HON. ROBERT B. MAYES, Chancellor.

Hinds and Adams counties, Mississippi, were the complainants in the court below; the Natchez, Jackson & Columbus Railroad Company; the Louisville, New Orleans & Texas Railway Company; the Yazoo & Mississippi Valley Railroad Company; the Farmer's Loan & Trust Company; and the Union Trust Company were defendants there. From a decree in favor of the defendants the complainants appealed to the supreme court.

The charter under which this controversy arises is the act incorporating the Natchez & Jackson Railroad Company. See Laws 1870, p. 221; amended Laws 1872, p. 279, authorizing the name to be changed to Natchez, Jackson & Columbus Railroad Company. In 1871 Adams county subscribed $600,000 to the capital stock, paying therefor by county bonds, and thereby acquired 12,000 shares of stock, as against 160 shares held by all other subscribers. By January, 1873, twelve miles of roadbed had been completed, and depot grounds in Natchez donated by the city. The financial panic of 1873 came on, and the board of supervisors of Adams county made so much trouble about the $600,000 of aid bonds that a compromise was effected, whereby the county's subscription was reduced to $300,000, and all bonds in excess of that amount were surrendered.

The work of construction progressed but slowly. The company had no resources except the Adams county subscriptions, paid in bonds as stated. It borrowed small sums of money on ordinary one-year mortgages from time to time. In 1878 the grading had reached Martin, but the track laying was still eight miles short of that place. In that year Hinds county subscribed

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$200,000, payable in bonds, but required that two directors should be appointed from and by the county and also required the subscription to be used on work in Hinds county; and the road was still nineteen miles from the county line. There was a nineteen-mile chasm to bridge in some way. In March, 1880, a $600,000 second mortgage was authorized, of which, however, only $27,500 was ever negotiated. In June, 1880, a $200,000 consolidated first mortgage was authorized, which was to be, and was, used in funding the previous mortgage debts, except the $27,500 second mortgage bonds. In 1881 the city of Natchez lent to the company $225,000 of the city's bonds, the company agreeing to protect the city against payment of either principal or interest, and depositing as collateral security for that agreement an equal quantity of stock, with voting power, and also the $600,000 second mortgage bonds above, less the $27,500 of which disposition was otherwise made.

In May, 1882, the company still urgently needed $150,000 to complete the road to Jackson; but its resources were exhausted. The stock liabilities of the company were as follows:

Adams county, stock issued in 1871.......	$300,000
Hinds county, stock issued in 1882........	200,000
City of Natchez, stock issued in 1882.....	225,000
All other stockholders, issued various times.	35,807
Total amount stock..................	$760,807

The company then authorized the sale of $1,500,000 of stock at ten cents on the dollar, in order to raise the $150,000 needed, with the right reserved to repurchase the same within eight months at the price paid. The stock so sold was to be exchanged for the purchasers' *notes,* which in turn were to be discounted. In fact, and in effect, the plan was to borrow $150,000 of personal notes from friends of the company to meet the emergency and to secure those notes when discounted by $1,500,000 of stock as collateral. This plan was carried out, the money raised.

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The $150,000 of notes fell due in June, 1883, and in the meantime railroad securities of every kind depreciated.

And so, in the latter part of 1882, the road got into Jackson. Its bonded and floating debts were then $380,286; its interest payments were about $53,053 annually, or about $17,887 in excess of its net earnings. It was, therefore, getting deeper into debt every year.

A plan was devised for a new consolidated mortgage at a lower rate of interest and in better form; and President Martin was sent, in 1883, to New York to place the bonds. He failed to find purchasers, and only succeeded in making an arrangement in May, by which the company purchased from one J. W. Drexel, on credit, $320,000 of mortgage bonds of the New York, West Shore & Buffalo Railroad Company, then worth about 90 cents on the dollar, for which it gave its own notes to the amount of $304,000 at 8 per cent interest, due in June, 1884, and pledged as security therefor the same $1,500,000 of stock which had been previously pledged for the $150,000 loan aforesaid, and also the proposed $1,250,000 of new mortgage bonds. Those Lake Shore bonds the company afterwards sold for $250,730, and with the proceeds paid off the $150,000 loan before mentioned.

These Drexel notes were afterwards extended, from time to time, the interest being paid in part only, until the 1st of June, 1885, under an agreement that if not paid then, Drexel was to become absolute owner of the company bonds and stock pledged as security, upon the further payment by Drexel of about $425,-000 needed to pay off prior liens and debts.

In January, 1887, the Drexel notes were still unpaid, time having been further extended under the above agreement. The city of Natchez then demanded a settlement; and in February, 1887, the company borrowed from Drexel a further sum of $226,050 on a note due April 7, 1887, with which to pay off the $225,000 Natchez bonds and interest due on them, according to its original agreement with the city set forth above. To

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secure this loan the company pledged to Mr. Drexel the same $572,500 of mortgage bonds unsold out of the once proposed $600,000 issue, which had been pledged to the city, as above stated. In other words, Drexel paid off the city bonds for the company, and was subrogated to the city's security. The city's *stock* in the company was also delivered to him as collateral.

In April, 1887, Mr. Drexel called for a settlement, and the company directors authorized the president to issue $1,500,000 of stock to his order when he should surrender the stock certificates and evidences of debt following: The $304,000 note of the year 1883; the $226,050 note of February, 1887; bonds of the first mortgage of 1880 amounting to $174,400; all company bonds of the proposed $600,000 mortgage held as collateral (including the $27,500 thereof which had been actually sold); the $1,500,000 of company stock previously pledged as collateral as shown above.

Those surrenders were made, and Mr. Drexel thereby became the owner of the company's $1,250,000 consolidated (and only unsatisfied) mortgage, and $1,500,000 of stock out of a total issue of $2,035,800 (of which Adams county held $300,000 and Hinds county $200,000). Such stock and bonds, so acquired by him, cost Mr. Drexel in cash and in unpaid accrued interest due him about $758,750, which, it is claimed by appellees, was a full value for the road in its then condition.

A new manager of the road was then appointed—Mr. T. J. Nichol—and in January, 1888, a new board of thirteen directors was elected, by *unanimous* vote, of whom six had served on the previous boards as constituted by the votes of the two counties.

In March, 1889, Mr. Drexel had died, and his stock and bonds were sold to the Financial Improvement Company for $800,000 of the first mortgage bonds of the Louisville, New Orleans & Texas Railway Company, the railroad of which had been constructed by the Financial Improvement Company, and paid for to that company by Louisville, New Orleans & Texas

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Railway Company bonds, of which the said $800,000 constituted a part. This Financial Improvement Company was owned by C. P. Huntington and by R. T. Wilson & Co., in the proportions, respectively, of 60 per cent and 40 per cent of the whole. The $1,250,000 of bonds of the Natchez, Jackson & Columbus Railroad Company, which they so acquired, were by them placed as collaterals for the entire issue of first and second mortgage bonds of the Louisville, New Orleans & Texas Railway Company.

In September, 1889, the new holders set about making the gauge of the road of standard width and adapting the road to an effective interchange of cars with the Louisville, New Orleans & Texas Railway Company. In January, 1890, at the annual meeting of stockholders, new directors were elected, all again *unanimously,* of whom a majority were connected officially with either the Louisville, New Orleans & Texas Railway Company or with the Financial Improvement Company.

Still the company continued to lose money each year, and in 1890 it sold its road to the Louisville, New Orleans & Texas Railway Company by a deed and by authority of an act of the legislature, approved February 19, 1890; the consideration expressed in the deed was $180,000, the sale being subject to the $1,250,000 mortgage. The road was thus converted into a part of the Louisville, New Orleans & Texas Railway system.

In February, 1892, an entire change in the ownership of the Louisville, New Orleans & Texas Railway Company's stock and bonds, formerly held by the Financial Improvement Company, occurred; and in October following the Louisville, New Orleans & Texas Railway Company and the Yazoo & Mississippi Valley Railroad Company were consolidated under the name of the latter company, which succeeded to all the rights and liabilities of the Louisville, New Orleans & Texas Railway Company.

The bill of complaint in this cause was filed in 1899 by Hinds county, Adams county joining later, for the purpose of setting aside the deed and sale of 1890, canceling the $1,250,000 of bonds and the $1,500,000 of stock, reorganizing the

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Natchez, Jackson & Columbus Railroad Company (excluding the $1,500,000 of stock aforesaid), and for an accounting of profits, alleged to be large. Decree by the court below for defendants.

Green & Green, Williamson & Wells, and *E. E. Brown,* for appellants.

That Hinds county and Adams county were stockholders of the Natchez road by subscriptions to and payment upon shares of the capital stock under its charter, and that by the transactions recited they had lost their $600,000 so invested, and had been defrauded of the property, rights, and franchises of the Natchez road by a pretended sale of the Natchez road by the Louisville, New Orleans & Texas Railway Company to itself. That these counties subscribed and paid for nearly all of the capital stock of the Natchez road, and were, without their knowledge or consent, deprived of this property so owned by them. That, generally speaking, the method by which this was brought about was by the issuance of 30,000 shares of stock to Jesup, and called the "Jesup stock," by the directors without authority, illegally, and in fraud of complainants' rights to pay two alleged debts, one for $226,050 to Jesup, trustee for Drexel; the other promissory notes for $304,000 to Drexel. That the $226,050 claimed to be an indebtedness of the Natchez road arose under an *ultra vires* agreement between the directors of the Natchez road and the city of Natchez, whereby the city of Natchez voted to subscribe for shares of stock of the Natchez road for $225,-000 and to issue its municipal bonds therefor, under the power granted by the charter of the Natchez road; and then the directors, after the void agreement, whereby the Natchez road agreed to pay the principal and interest of said city of Natchez bonds for $225,000 and to deposit $600,000 of its bonds, authorized to be issued only for construction, as collateral security to indemnify and save harmless the city of Natchez from its said subscription to the capital stock. The other alleged indebted-

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ness of $304,000 arose out of the "New York loan" by Drexel to the Natchez road in New York, and whereby was exacted as usury, out of the $304,000, face of notes, the sum of $95,873; in other words, to get $208,126.23 the directors of the Natchez road authorized the giving of the notes by the Natchez road for $304,000. The urgent necessity of raising this $208,000 was that a number of its directors had given their accommodation paper to the Natchez road for $150,000 face, and the affairs of the company were becoming embarrassed, and so these directors, constituting a majority of the board who authorized and voted on this $304,000 loan and the subsequent transactions pertaining thereto, to get the money to pay this accommodation paper authorized this usurious loan.

To get the money to perform the *ultra vires* contract to pay the city of Natchez bonds for $225,000, the board of directors of the Natchez road borrowed $225,000 from Jesup, trustee, and gave the $572,500 of the $600,000 issue of mortgage bonds as collateral. These were the two debts for which the 30,000 shares of "Jesup stock" were issued, and the $1,250,000 of first mortgage bonds of September 1, 1882, were claimed to be negotiated.

The 30,000 shares so issued were, under the resolution of the board of directors, to take up all the indebtedness shown by the June 4th contract, then held by the Farmers' Loan & Trust Company, and under this the $1,250,000 of first mortgage bonds should have been surrendered and canceled; but, instead, they were delivered to Jesup, without any consideration whatever, and he and associates, then in practical control of the road, through the 30,000 shares of stock held by them, treated these bonds as their private, personal property, and as if they had been issued to them; and thus the $1,250,000 of bonds became outstanding in the hands of Jesup and associates. With possession of the 30,000 shares, Jesup and associates, through Nichol, took charge of the Natchez road, and ran it in their own interest and to suit themselves. On March 2, 1889, Jesup

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made a private deal for the railroad, as if his private property, with the Financial Improvement Company, *alias* Wilson, Huntington, and associates, *alias* Louisville, New Orleans & Texas Railway Company, a copy of which is attached to R. T. Wilson's deposition, and recited in the bill, whereby it was agreed that Jesup had sold, and on or before May 1, 1889, would deliver, to the Financial Improvement Company the $1,250,-000 first mortgage bonds, and $1,500,000 of capital stock par value (30,000 shares), being all that was owned or controlled by Jesup out of a total of $2,028,000 par value of the capital stock of the Natchez road, and "would on or before said date cause a majority of the board of directors of the Natchez, Jackson & Columbus Railroad Company to be reconstructed by successive resignations, so that said parties designated by the said Financial Improvement Company shall constitute a majority of the board of directors, it being understood by this that Jesup shall place in the hands of the Financial Improvement Company a written resignation of a majority of said directors. (2) That upon such delivery of said bonds and stocks and said reconstruction of said board of directors the said Financial Improvement Company will pay to said Jesup $800,000 par value of the first mortgage 4 per cent gold bonds of Louisville, New Orleans & Texas Railway Company, carrying coupons maturing September 1, 1889, and subsequent coupons less the accrued interest from March 1, 1889. (3) That Jesup is entitled to all cash in hand and accounts receivable of the said Natchez road up to and including April 30, 1889, and is to pay, indemnify, and save harmless said Financial Improvement Company and its successors against all debts against the Natchez road ('debts' to include all existing indebtedness of operation, construction, and equipment and acquisition of right of way) up to and including April 30, 1889, except the $1,250,000 of first mortgage bonds. (4) That Financial Improvement Company has assumed in behalf of Natchez road its existing contracts with Joliet Steel Company for about 300 tons of steel rails at

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$33 a ton. (5) That Jesup shall not sell or dispose of the $800,000 of bonds for five years; but if R. T. Wilson and C. P. Huntington and associates shall, during said five years, make a sale of their bonds, issued under the same mortgage, then Jesup to have the privilege of participating *pro rata* in such sale. (6) That if Jesup, prior to May 1, 1889, shall find it will cost more than $10,000 to pay for the right of way and other claims, other than the current indebtedness of Natchez road, and the Financial Improvement Company will not pay the excess over that amount, then Jesup to have right to cancel this contract."

This contract was performed, and after May 1, 1889, the Louisville, New Orleans & Texas Railway Company was in possession of the Natchez road, and its auditor audited its accounts, and on July 1, 1889, the two were managed by common executive officers.

In January, 1890, the stockholders' meeting of Natchez, Jackson & Columbus Railroad Company was controlled through the "Jesup stock," then held by the Louisville, New Orleans & Texas Railway Company, or by its *alter egos* for it, and the control of the Natchez, Jackson & Columbus Railroad Company was made effective by the election of its own board of directors. Being thus in actual control, the Louisville, New Orleans & Texas Railway Company, through its attorney, drew a bill to authorize Natchez, Jackson & Columbus Railroad Company to sell its property or to consolidate the same, and it was passed by the legislature through the instrumentality of Gen. Martin, then attorney of the Natchez road, and under this act the authority was claimed whereby the Louisville, New Orleans & Texas Railway Company, then in possession and control of Natchez road, pretended to purchase it under a contract made with itself, under *ultra vires,* illegal and fraudulent resolutions, for a recited consideration of $180,000 cash, which was not paid, and subject to the said $1,250,000 of bonds so unlawfully outstanding, and the Louisville, New Orleans & Texas Railway Company to provide for the payment of all the indebtedness and

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obligations incurred since May 1, 1889, the date of its taking possession under the contract with Jesup.

The agreement by the board of directors to pay the $225,000, city of Natchez bonds, given in payment of the subscription of Natchez to $225,000 of the shares of the capital stock of the Natchez road, and the payment of these bonds by the loan of $226,050 from Jesup, trustee, were *ultra vires* and void.

The powers conferred by the charter of the Natchez road (Laws 1870, p. 221) upon cities and counties were expressly limited to subscriptions to the capital stock and to the issuance of city or county bonds in payment for said subscription. Sec. 15 expressly limits the power to "may subscribe to the capital stock." By sec. 16: "No such subscription shall be made until the question has been submitted to the legal voters" upon petition, "in which petition the amount proposed to be subscribed shall be stated" for the purpose of voting for or against such subscription. By sec. 17: If two-thirds of the legal voters vote "for subscription," "it shall be the duty of . . . the chief executive officers of such incorporated city . . . to subscribe to the capital stock of said railroad company in the name of such . . . city . . . the amount so voted to be subscribed, and to receive from said company proper certificates therefor. He shall also execute to said company, in the name of such city, . . . bonds bearing interest at 7 per cent *per annum*, . . . said bonds shall be delivered to the president . . . of said company for the use of said company." By sec. 19: A tax is required to be levied to pay the same.

Article XII., sec. 14, Constitution 1869, provides: "The legislature shall not authorize any county, city, or town to become a stockholder in, or to lend its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town at a special election or regular election, to be held therein, shall assent thereto."

Here are two powers that may be authorized by the legisla-

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ture upon a two-thirds vote: One, a subscription to stock; the other, to lend its credit.

This sec. 14 was construed in *Hawkins* v. *Carroll Co.,* 50 Miss., 737, to prohibit the legislature from authorizing a subscription to the capital stock or a lending of credit, without an antecedent vote of two-thirds of the voters; and that "assent" meant "agreement or consenting to," "and this can be manifested in an election only by an affirmative action, by actually voting."

The answer does not claim that the acts of the city of Natchez were a subscription to the capital stock, but that it was the lending of the city's credit to the railroad company through the form of the subscription of stock. If the city of Natchez was merely a stockholder, then it is manifest that the directors could not mortgage the road to pay off a part of the stock; and so the claim is now made that it was a loan of the city's credit. *Hill* v. *Memphis,* 134 U. S., 198; *Hawkins* v. *Carroll Co., supra; Johnson City* v. *Railroad,* 100 Tenn., 138; *Lewis* v. *City of Shreveport,* 108 U. S., 282; *U. S.* v. *Macon,* 99 U. S., 589; *Lewis* v. *City,* 108 U. S., 282, *supra; Central Trans. Co.* v. *Pullman,* 139 U. S., 48; *German Safety, etc., Co.* v. *Boynton,* 71 Fed. Rep., 797; *St. L. R. Co.* v. *Terre Haute R. R. Co.,* 145 U. S., 404; *L. & N. R. R. Co.* v. *Ky.,* 161 U. S., 692; 2 Clark & Marshall, Corp., sec. 539, and cases; *Chicago* v. *Cameron,* 22 Ill. App., 91 (120 Ill., 447); *Id.,* secs. 393, 397.

The contract voted on was, as shown by the mayor's proclamation for the election, a subscription of $225,000 to the capital stock of the Natchez road upon the terms and conditions:

"To subscribe" for $225,000 of stock, and to pay "the amount of the subscription of the city," etc. "Upon the execution and delivery of said bonds by said city, and the delivery to the said city of the certificates of stock for which said bonds are to be in payment," said Natchez road "is to deliver to Britton & Koontz, bankers, as agents and trustees, $600,000 in the 7 per cent mortgage bonds of said company, issued the first day of April,

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A.D. 1880, in manner and form according to law," . . . "to be held as collateral by said agents and trustees for the purpose of indemnifying and saving harmless said city from any damage or risk arising from said subscription to said capital stock by paying the principal and interest of said bonds, and prevent any levy of tax to pay any part of the principal or interest of said bonds." "That said railroad company may, at any time, pay and redeem said mortgage bonds so pledged and hypothecated, and thereby repurchase from said city said certificates of stock, and may also negotiate said collaterals for any part thereof in payment of the city bonds or in payment of any mortgage existing on the road at the date hereof."

That, as recited in the minutes, it became the mayor's duty under sec. 17 of said act, entitled, "An act to incorporate the Natchez, Jackson & Columbus Railroad Company," to subscribe to the capital stock of said Natchez road, in the name of the city of Natchez, the said amount of $225,000 so voted to be subscribed, and to receive certificates therefor.

This $600,000 of mortgage bonds were authorized to be issued, as recited in the resolutions authorizing their issuance, for "the purpose of constructing and maintaining the railroad . . . between the cities of Natchez and Jackson, a loan be negotiated and money be borrowed upon the credit of said company," etc.; and yet, with these recitals in the face of the mortgage, this issue of $600,000 is diverted from the authorized purpose of issuance to be used as indemnity against this stock subscription.

"Construction" means the building of tracks, side tracks, switches, terminals, etc., and it refers to the building of the railroad itself, and not to equipment. 23 Am. & Eng. Ency. Law (2d ed.), 710; *Phil. R. Co.* v. *Williams,* 54 Pa. St., 103; 23 Am. & Eng. Ency. Law (2d ed.), 720; *Mellon* v. *Morristown R. R. Co.* (Tenn.), 35 S. W., 464; *Brown* v. *Buck,* 54 Ark., 453; *Pac., etc., Co.* v. *James Con. Co.,* 68 Fed. Rep., 966; *Miss., etc., R. R. Co.* v. *Brown,* 14 Kan., 577; *Atchison, etc.,*

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R. R. Co. v. *McDonnell,* 25 Kan., 370; *Commonwealth* v. *Smith,* 10 Allen, 457, 458; Jones on Corp., Bonds & Mort., sec. 10; *L. & N. R. R. Co.* v. *Ky.,* 161 U. S., 685.

In *So. Pac. Ry. Co.* v. *Esquiral,* 36 Am. & Eng. Rd. Cas., 418, it was held: "The power to procure means to construct the road in question was not a general power; it was a particular power to be exercised for a special object." *Frazer* v. *East Tenn. R. Co.* (88 Tenn.), 40 Am. & Eng. E. R. Cas., 365; *Thomas* v. *West Jersey R. R. Co.,* 101 U. S., 7; *State* v. *Morgan,* 28 La. Ann., 482; *Atkison* v. *Marietta R. Co.*, 15 Ohio St., 21; *Pittsburg R. Co.* v. *Allegheny Co.,* 63 Penn., 126; note to *Glouinger* v. *Pittsburg R. Co.,* 46 Am. & Eng. Rd. Cas., 292, *et seq.; Louisville Ry. Co.* v. *Louisville Trust Co.,* 174 U. S., 552; *Citizens & Co.* v. *Perry Co.,* 156 U. S., 709, 710; *Sutless* v. *Lake Co.,* 147 U. S., 238; *Central Trust Co.* v. *Pullman Co.,* 139 U. S., 48.

Directors must refer to the stockholders the question of accepting an amendment to the charter. 1 Cook on Stockholders, sec. 499; 1 Cook on Stockholders, secs. 500 (note 1), 501; *N. O., J. & G. R. R. Co.* v. *Harris,* 27 Miss., 517; *Hester* v. *Memphis, etc., R. R. Co.,* 32 Miss., 381; *Knoxville* v. *Knoxville R. R. Co.,* 22 Fed. Rep., 763; *Stevens* v. *Rutland R. R. Co.,* 29 Vt., 5; *State* v. *Accommodation Bank,* 26 La. Am., 288; *Alexander* v. *Atlanta R. R. Co.,* 15 Am. & Eng. Rd. Cas., 377; 1 Thompson on Corp., sec. 76; *Clearwater* v. *Meredith,* 1 Wall., 25; 2 Am. & Eng. Ency. Law (2d ed.), 680, 681.

A dissenting stockholder has the right to stand upon the contract of association, as made, and equity will grant him relief, either preventing or annulling, against any acts of the majority beyond their powers. *Mason* v. *Pewabic Min. Co.,* 133 U. S., 50; *Dodge* v. *Wolsey,* 18 How., 331; *Hawes* v. *Oakland,* 104 U. S., 450; *Central R. Co.* v. *Collins,* 40 Ga., 617; *Carson* v. *Iowa, etc., Co.,* 80 Iowa, 638; *Erwin* v. *Oregon R. Co.*, 27 Fed. Rep., 625; *Pender* v. *Pusbington L. R.,* 6 Ch., 70.

The question of power of the legislature to fundamentally

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amend charters, without unanimous consent, under general statutes reserving the power to amend, alter, or repeal, was considered in a clear opinion, precisely in point, in *Mills* v. *Central R. R. Co.,* 41 N. J. Eq., 1; and also in *Zabriskie* v. *Hackensack R. Co.,* 18 N. J. Eq., 178 (s.c., 90 Am. Dec., 617); *Black* v. *Delaware Co.,* 24 N. J. Eq., 468.

The rule is uniform in this state that counties can be bound only by acts of boards of supervisors entered upon their minutes in all classes of cases—governmental or private and as a public body.

In *Jefferson County* v. *Grafton,* 74 Miss., 435, it was held that the board of supervisors had no power to convey or deal with the property of the county, whether public or private, unless expressly authorized by statute, and that these county matters differed from municipalities proper, and that where the board of supervisors had sold and conveyed a piece of land owned by the county for private, as contradistinguished from public, purposes, under Code 1880 there existed no power in the board to sell it, and that the deed conveying it should be set aside, even as against subsequent purchasers for value; and this when the sale was made in 1883 and the bill was filed in 1896, or thirteen years afterwards.

In *Adams* v. *N. J. & C. R. R. Co., supra,* it was held that these counties were owners of the stock in their private capacity, under this charter, and free from legislative control, and that the legislature had no power to appoint an agent to bring suit to protect the counties' interests therein.

In *Monroe County* v. *Strong,* 78 Miss., 565, it was held that the county was not bound by an *ultra vires* contract for a bridge, after full performance, because the limitation on its power of payment was disregarded in the contract.

Blodgett v. *Seals,* 78 Miss., 522, 524, held: "The property rights vested for management in public boards can only be passed by them by appropriate action taken by them in open session and by a majority vote of those present. . . . Such

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assignment, if made, could only be evidenced by its minutes to that effect. Here only some random talk was had with or between the members of the board or of its executive committee," etc.

Hence, we insist that there could be no estoppel as to the *ultra vires* act of the board of directors in hypothecating said $600,000 of bonds to indemnify Natchez, and in promising to pay the $225,000 Natchez bonds, even though the president of the board of supervisors of Adams county was present when the agreement so to do was reported to the stockholders of the Natchez road, and his failure to vote against it, or even his voting for the report, being beyond the power delegated to him.

It is not even claimed that the president of the board of supervisors of Adams county ever reported this agreement to indemnify Natchez to the board of supervisors of Adams county, or that the board ever made an order approving of the *ultra vires* change of contract, or the *ultra vires* use of the $600,000 of bonds. The alleged estoppel rests upon the mere fact that the president of the board of supervisors of Adams county was present, and that it does not appear that he voted against the report of the president of Natchez road stating that that agreement had been made by the directors.

It was *ultra vires* the charter to borrow money to consolidate the debts, liens, and incumbrances. The two then pressing debts were that of the city of Natchez for the $225,000 and the $150,000 accommodation paper. These were not construction debts, or even valid debts of the company, for the reasons stated, *supra*.

The directors who had made this accommodation paper for $150,000 with themselves and the city of Natchez became, in 1883, urgent for the payment of their debts. Gen. Martin went to New York to borrow money to discharge these pressing debts, and being unable to sell the bonds to do this, he, with the authority and procuration of these creditor-directors, made a loan, couched, to hide usury, in the form of a sale of

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N. Y., West Shore, etc., R. R. bonds from Drexel of $320,000 for the company's note of $304,000 and 6 per cent interest and commissions, and which cost to obtain, in usury, commissions, etc., over $95,000. That this was grossly usurious and shocking to the conscience goes without saying. And yet these creditor-directors authorized and ratified this transaction to pay themselves. That this transaction was a "loan" is shown by the minute book 2, where Gen. Martin reports it as a "loan." That Drexel knew that it was a "loan" is conclusively shown by the contract of June 4, 1883, evidencing the transaction, and by the agreement between Drexel and Jesup, Ex. 11, to the deposition of Samuel Sloan, and where it is recited as a "loan."

These directors then, to pay themselves, had the called meeting of April 20, 1883, at which there were present six out of ten of these accommodation-paper directors, and they, by their votes, granted this authority. Then, at the called meeting at which this Drexel loan was again considered and authorized of May 17, 1883, five out of the ten present were accommodation-paper directors.

And so on June 12, 1883, when the report of Gen. Martin was made of the Drexel loan of $304,000, and his act in making the contract of June 4, 1883, was confirmed, six out of the nine present were accommodation-paper directors.

Aside from the grossly usurious character of this transaction, it was void because by it these directors voted to borrow money to pay themselves, and to issue $1,500,000 of stock and $1,250,-000 first mortgage bonds as security therefor, and which stock and bonds were to become, upon condition, the absolute property of Drexel upon default in payment of the $304,000 notes. Thus these directors bargained away, practically, the whole corporate property to pay themselves.

It was void because usurious.

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Chap. 4, Tit. III., N. Y. Rev. Stat. 1882, pp. 2253–4 makes void all notes, etc., for more than six per cent interest.

The hypothecation of the bonds and stock as collateral security to the usurious loan under the statute of New York and its decisions was void and recoverable in trover by the pledger. Colebrooke, Collat. Sec., secs. 135, 136, 137.

The answer does not set up that the transaction, though usurious as to individuals, was not usurious, because the statute of New York does not permit corporations to plead usury. It defends on the ground that the transaction was a sale, and not a loan. The very allegations of the answer itself, properly interpreted, show it was a loan, and not a sale.

The rule of public policy prevails and makes this class of contracts void as unlawful; and it would seem that in a controversy between a stockholder, claiming adversely to the act of the corporation, and the parties, wrongdoers, claiming under the unlawful act against the stockholder, such claimant should not be allowed to set up the disability of the corporation to plead usury to defeat the suit of the stockholders. The positions are reversed: Drexel claims under the unlawful act of the Natchez road, the stockholders seek to annul that unlawful act; Drexel claims in privity under the unlawful act, the stockholders adversely to and in denial of it. Under such circumstances we insist that Drexel should not be allowed to take advantage of the unlawful act. The directors here have done an act forbidden by law. *McWilliams* v. *Phillips*, 51 Miss., 196.

This contract, aside from the usury statute, was void as being a fraudulent, unconscionable bargain. *Inge* v. *Building Ass'n*, 79 Miss., 20.

A mortgagee whose security is tainted with usury cannot claim any rights as a *bona fide* holder against secret equities. *Mayer* v. *Cook*, 85 Ala., 417; *Smith* v. *Lehman*, Ib., 294; Webb on Usury, sec. 392; *Banks* v. *Flynt*, 10 L. R. A., 459; Colebrooke, Collat. Sec., secs. 135, 136, 137; *Union Nat. Bank* v. *Fraser*, 63 Miss., 232.

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A void usurious contract cannot constitute a valid consideration for a subsequent *assumpsit*. *Beauchamp* v. *Leagan,* 14 Ind., 401, *supra; Kendrickson* v. *Godsey,* 54 Ark., 193, *supra.*

This amendment to the charter authorizing a sale or consolidation was a fundamental change, and required the unanimous consent of the stockholders.

Where a corporation is created without power to consolidate, either under its charter or general laws, a grant of authority to consolidate, either under its charter or general laws, except in the form of an enabling act, makes a change of a material and fundamental character in its charter. The exercise of the power conferred under such condition requires the unanimous consent of the stockholders. Noyes, Inter. Corp. Rel., sec. 42.

The legislature has no power to authorize a consolidation except by unanimous consent. *Zabriskie* v. *Hackensack R. R.,* 18 N. J. Eq., 178; *Black* v. *Delaware, etc.,* 24 *Id.,* 468; *Mills* v. *Central R. R.,* 41 *Id.,* 1. In *Hale* v. *Cheshire,* 161 Mass., 443, and *Market St.* v. *Hellman,* 109 Calf., 571, it was held that the legislature had power to authorize a majority of the stockholders to accept a fundamental amendment. No such power was attempted to be exercised here. All the cases concur that unless the legislature does expressly authorize the majority to accept the amendment, it requires unanimous consent. 2 Cook, Stock and Stock. (3d ed.), sec. 896.

Power to sell or consolidate must be express or by necessary implication. "Any ambiguity in the terms of the grant must operate against the corporation." *Am. Trust Co.* v. *M. & W. R. Co.,* 115 Ill., 651; *Black* v. *Del. Canal Co.,* 24 N. J. Eq., 455. The withholding of a power to sell is a denial of the right to exercise that power. *Am. Trust Co.* v. *M. & W. R. Co.,* 157 Ill., 652; 3 Wood Ry., sec. 486.

This act of 1890, being a fundamental change of the charter, if it was mandatory in its terms, which it is not, would have to be accepted unanimously by the stockholders, and as this was not done, the deed made under it was *ultra vires* and void.

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This act of 1890, Acts 1890, p. 676, was a mere *enabling* act, and as such required *unanimous* consent of the stockholders. It merely gave the corporation power to do the acts recited, if its stockholders desired; and, hence, the legislative intent was that the stockholders of the Natchez road might or might not, as they might elect, sell or consolidate their railroad.

This act of 1890 did not confer power to sell to Louisville, New Orleans & Texas Railway Company.

Mayes & Longstreet, and *McWillie & Thompson,* for appellees.

Proposition 1.—The bill is based throughout on the postulate that because complainants are counties they are not bound by the ordinary rules of law generally applicable to similar transactions, but have greater rights based on sovereignty. But there is no element of sovereignty in the case. The counties, *quoad hoc,* had precisely the same rights, and were subject to the same liabilities and obligations as natural persons. *Adams* v. *Railroad Co.,* 76 Miss., 714; 1 Cook on Stockholders, sec. 9; *Shipley* v. *Terre Haute,* 74 Ind., 297; *Marshall* v. *Railroad Co.,* 92 N. C., 322; *Bank* v. *Planter's Bank,* 9 Wheat., 904; *Curran* v. *State,* 15 How. (U. S.), 304; *Murray* v. *Charleston,* 96 U. S., 432; *Western Society* v. *City,* 31 Pa., 175; *Same* v. *Same,* 31 Pa., 185.

Proposition 2.—Passing by, for the present, any discussion of the lawfulness or the alleged fraudulent character of the several transactions assailed by the bill, we submit that these complainants cannot successfully assail them, for the reason that what was done was done by them. All the early history of the Natchez, Jackson & Columbus Railroad Company was made by them absolutely. Until 1881 Adams county alone owned and voted $300,000 of the total $335,809 of stock; in 1881 that county owned and voted $300,000 and the city of Natchez $225,000 out of a total of $560,809; in 1882, and until February, 1887, Adams county owned and voted $300,000,

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Hinds county $200,000, and the city of Natchez $225,000, out of a total of $760,809. Wherefore, until 1882 the county of Adams controlled the company and all of its dealings absolutely; and from 1882 until Mr. Drexel closed his contracts and took charge, in April, 1887, the two counties did the same. What was done previous to the latter date was in effect done by complainants *themselves;* afterwards what followed was the logical and certain result of their action. *Pearsall* v. *Great Northern Railway,* 161 U. S., 646, 671.

Proposition 3.—The contract of 1883 with Mr. Drexel is assailed as grossly usurious and oppressive, but it was not. Section 22 of the company's charter expressly empowered it to sell its notes, bonds, and stock at such rates as its directors considered would best advance its interests, and expressly declared that when sold they should be valid as if sold at par. *Railroad Co.* v. *Ashland Bank,* 12 Wall., 226. Nor was it usurious, considered as a New York transaction, under the statutes of that state, for by these very statutes it is declared that no corporation shall set up the defense of usury. *The Vigilancia,* 68 Fed., 781; *Railroad Co.* v. *Bank,* 12 Wall., 226; *Hubbard* v. *Todd,* 171 U. S., 474; *Lane* v. *Watson,* 51 N. J. Law, 186; *Trust Co.* v. *Auten,* 68 Ark., 229. But, moreover, it would not have been usurious under the law of New York, even between natural persons. No difference what might have been Mr. Drexel's designs and motives, the evidence shows uncontradictedly that President Martin intended, not a loan with a contrivance to cover up usury, but a *bona fide* and final *purchase* of the West Shore bonds. *Bank* v. *Snodgrass,* 4 How. (Miss.), 573; *Bass* v. *Patterson,* 68 Miss., 310; *Chaffe* v. *Hughes,* 57 Miss., 256; *Matlock* v. *Cobb,* 62 Miss., 43; *Ayvault* v. *Chamberlain,* 33 Barb., 229; *Bank* v. *Waggoner,* 9 Pet., 378, 404; *Smith* v. *Beach,* 3 Day, 268, 271; *Mills* v. *Crocker,* 9 La. Ann., 334; *Selby* v. *Morgan,* 3 Leigh., 577; *Culver* v. *Bigelow,* 43 Vt., 249; *Willoughby* v. *Comstock,* 3 Edw. Ch., 424; *Kelly* v. *Sprague,* 58 Hun., 611; *Brockenbrough* v. *Spindle,* 17 Gratt.,

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21; *England* v. *Moore,* 3 Houst., 289; *Stuart* v. *Bank,* 19 Johns., 508; *Thomas* v. *Murray,* 32 N. Y., 605; *In re Kellogg,* 113 Fed. Rep., 120, 129.

The mere wisdom or unwisdom of the transaction is not open for judicial examination. Thompson on Corp., sec. 4003; 21 Am. & Eng. Ency. Law, p. 865.

Proposition 4.—Complainants urge further that the agreement of 1883 was fraudulent and void as to them because made in great part in order to pay off the $150,000 debt, as to which certain of the directors were practically indorsers. But the rule that directors of an insolvent corporation may not prefer themselves has no application. The agreement of 1883 was made by a "going" concern, not in contemplation of insolvency or a cessation of business, but to carry on its construction and in furtherance of the ends of its creation. By that agreement the company was enabled to pay off debts lawfully incurred, for which $1,500,000 of stock was lawfully pledged; and thereby the ownership of two-thirds of the property and the complete control of the company were saved, for, as it turned out, four years longer. The discharge which the directors got from their contingent liability was merely incidental. *Sells* v. *Grocery Co.,* 72 Miss., 590; *Richardson* v. *Davis,* 70 Miss., 219; *Love Mfg. Co.* v. *Queen City Co.,* 74 Miss., 290; *Twin Lick Co.* v. *Marbury,* 91 U. S., 587; *Hanchett* v. *Blair,* 100 Fed., 817, 823; *Fitzgerald Co.* v. *Fitzgerald,* 137 U. S., 98, 110; *Garden* v. *Butler,* 30 N. J. Eq., 721; *Harts* v. *Brown,* 77 Ill., 226; *Mullanphy Bank* v. *Schott,* 34 Ill. App., 500; *Glouninger* v. *Railroad Co.,* 139 Pa. St., 13.

Proposition 5.—Complainants maintain that the condition attached to the Natchez subscription—to wit, that the company should pay off the bonds and interest—was void; that the subscription was in effect unconditional, and that the act of the directors in borrowing money in 1887 with which to pay those city bonds led to the loss of the road to the original stockholders, and avoided the whole transaction as to the counties. Even if other-

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wise well taken, that point cannot be successfully made by these complainants or at this late day. But there is nothing in it, in any event. No special authority, in any statute, was needed in order to enable the counties to impose conditions on their subscriptions. *Clark* v. *Rosedale,* 74 Miss., 543; *Converse* v. *City,* 92 U. S., 503; 20 Am. & Eng. Ency. Law, 1118. Moreover, if such authority had been necessary, its absence was cured by Laws 1882, p. 1027, which recognized the subscription and its conditions.

Proposition 6.—Complaint is also made because at the annual meetings of 1888 and 1889 the directors were elected and the practical control of the road was taken by the holders of the $1,500,000 of stock issued, as aforesaid, in April, 1887, to the order of Mr. Drexel. The argument seems to be that such stock was wrongfully issued and was fraudulent in effect, as against the other stockholders. The idea seems to be that when the $150,000 borrowed in 1883, and for which $1,500,000 of stock had been in effect pledged as security, was paid, the company's title to the stock so pledged was cleared, and the stock should have been canceled. But, as already shown, the lender of the money which paid off the $150,000 (and more) required and took the stock as collateral for his loan, and the company's title to it was not cleared; it was a mere change of pledges. Moreover, the complainants themselves voted for those very directors, and cannot now complain of their own nominees. *Windmuller* v. *Distributing Co.,* 114 Fed., 491, 494; *Farmer's L. & T. Co.* v. *Railroad Co.,* 163 U. S., 31, 44; *Pender* v. *Lushington,* L. R., 6 Ch. D., 70; *Camden R. R.* v. *Elkins,* 37 N. J. Eq., 273; *Hodge* v. *U. S. Steel Corp.,* 60 L. R. A., 742, 747; *Rogers* v. *Nashville R. R.,* 10 Am. & Eng. Corp. Cas., 82, 106.

Proposition 7.—The consideration of the sale of the road to the Louisville, New Orleans & Texas Railway Company was not fictitious, as is claimed by complainants. Mr. Drexel paid for his stock and the $1,250,000 of bonds over $788,000. The evidence shows clearly that sum was the full value of the road in its then

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condition, and certainly the stock and bonds could not be worth more than the road. In fact, he exchanged all of both stock and bonds so purchased by him with the Financial Improvement Company for $800,000 of Louisville, New Orleans & Texas Railway Company's four per cent bonds. The bonds and stock so acquired by the Improvement Company therefore cost it $800,000 of Louisville, New Orleans & Texas Railway bonds and $180,000 cash. Neither is there anything in the claim that the $180,000 cash payment was a fiction, because the amount having first been credited to the Canton, Aberdeen & Nashville Railroad Company, was afterwards credited to the Louisville, New Orleans and Texas Railway Company. The undisputed evidence shows that the Canton, Aberdeen & Nashville Railroad Company owed the Louisville, New Orleans & Texas Railway Company more than that amount for moneys advanced for betterments, and the debt was thereby canceled, *and no creditor has ever complained.*

Proposition 8.—The sale of 1890 to the Louisville, New Orleans & Texas Railway Company was not void for want of authority in the directors to make it without the special consent of the stockholders. Section 9 of the charter gave such authority, in effect, and in such case the stockholders have consented in advance, it is their charter contract. 3 Thomp. on Corp., sec. 3983; *City* v. *Gas Co.*, 70 Mo., 69, 98.

Proposition 9.—Nor was the sale of 1890 void because in the stockholders' meeting which ratified it one of the stockholders voted fifty-four shares against it. Unanimous consent is not necessary to the sale by a private corporation of its entire property when its business is unsuccessful. *Berry* v. *Broach,* 65 Miss., 450; *Wilson* v. *Miers,* 100 E. C. L., 348; *Treadwell* v. *Mfg. Co.,* 7 Gray, 393; *Sargent* v. *Webster,* 13 Metc., 497; *Sewell* v. *East Cape Co.,* 50 N. Y. Eq., 717; *Hodges* v. *New England Co.,* 1 R. I., 347; *Peabody* v. *Waterworks,* 37 Atl. Rep., 807; *Hayden* v. *Official, etc.,* 42 Fed., 875. Nor is the

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rule different because the corporate property is affected with a public use. 7 Am. & Eng. Ency. Law, p. 474; *Gibbs* v. *Gas Co.,* 130 U. S., 396; *Lanman* v. *Railroad Co.,* 6 Casey, 42; *Grate* v. *Railroad Co.,* 5 Wright, 447; *Commonwealth* v. *Railroad Co.,* 53 Penn. R., 9; *Treadwell* v. *Salisbury Co.,* 7 Gray, 393; Grant on Corp., 68; *Black* v. *Delaware Co.,* 22 N. Y. Eq., 130; *Berger* v. *U. S. Steel Corp.,* 53 Atl. Rep., 14, 68.

The *state's* consent to the sale was, moreover, given by the act of February 19, 1890.

Proposition 10.—Complainants are estopped on all the points of objection now made by them; estopped by participation, by acquiescence, by laches—in every way possible. Step by step the two counties in effect managed the road, and step by step took part in its affairs. And that was true as to Adams county, from 1871 until the end, acting by the president of the board of supervisors, as provided in the charter; and as to Hinds county, from 1882 until the end, acting by its own two directors. *Berry* v. *Broach,* 65 Miss., 450; *Railroad Co.* v. *Graham,* 60 N. E. Rep., 405; *Bradford* v. *Railroad Co.,* 142 Ind., 383; *Crump* v. *Colfax Co.,* 52 Miss., 107; *Handley* v. *State,* 139 U. S., 417; *Ins. Co.* v. *School Dist.,* 80 Fed., 366; *Brookhaven* v. *Lawrence Co.,* 55 Miss., 187; *Houston* v. *Building Ass'n,* 80 Miss., 31, 42; *Smith* v. *Duncan,* 16 N. J. Eq., 240; *Smith* v. *Clay,* 3 Bro. C. C., 640, note; *Terry* v. *Eagle Co.,* 47 Conn., 141; *Alexander* v. *Searcey,* 81 Ga., 536; *Rabe* v. *Dunlap,* 51 N. J. Eq., 40; *Boston, etc.,* v. *Railroad Co.,* 13 R. I., 260; 18 Am. & Eng. Ency. Law, pp. 114, 115, 126; 2 Cook on Corp., sec. 732; *Harwood* v. *Railroad Co.,* 17 Wall., 78; *State* v. *Bailey,* 19 Ind., 452; *State* v. *Milk,* 11 Fed., 389; *Johnson* v. *Transit Co.,* 156 U. S., 618.

Argued orally by *M. Green,* for appellants, and by *Edward Mayes,* for appellees.

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Opinion of the court.

ALEXANDER, Special Judge, delivered the opinion of the court.*

This is a suit brought by the counties of Hinds and Adams, as stockholders of the Natchez, Jackson & Columbus Railroad Company, to cancel, as fraudulent in fact and unauthorized in law, the sale by that company of its railroad property and franchises to the Louisville, New Orleans & Texas Railroad Company, and for other incidental relief. The sale was made pursuant to an act of the legislature approved February 19, 1890 (Laws 1890, p. 675, ch. 502), entitled "An act to authorize the Natchez, Jackson & Columbus Railroad Company to sell its railroad situated in this state, or to consolidate the same." Section 1 of the act authorized the company to sell absolutely all or any part of its railroad, including its franchises. Section 2 empowered the Louisville, New Orleans & Texas Railway Company to consolidate with the Natchez, Jackson & Columbus Railroad Company on such terms as might be agreed on by them.

The record contains a complete history of the Natchez, Jackson & Columbus Railroad Company, in its minutest details, from its incorporation and organization. After a careful examination of all the evidence relied on by plaintiffs as establishing fraud, we concur with the chancellor in his finding: that there was no actual fraud either on the part of the buying or selling corporation, in the sale itself or in any of the dealings culminating in the sale. Nor do we find any actual fraud in the issuance, hypothecation, or sale of capital stock. On the contrary, we think that the history of the Natchez, Jackson & Columbus Railroad Company presents a record singularly free from any suspicion of misconduct, and characterized by scrupulous regard for stockholders and fidelity and fairness to creditors. At the time the company was chartered, in 1870, it could hardly have been considered a promising business venture by

*Judge Calhoon, having been of counsel before his appointment to the bench, recused himself, and C. H. Alexander, Esq., a member of the supreme court bar, was appointed and presided in his place.

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those conversant with the then conditions in this state. Projected without any capital stock or financial backing, and dependent for its construction almost wholly upon county aid, its natal and normal condition was insolvency. That the task of its construction was undertaken at all was due mainly to the indomitable zeal and energy of its chief promoter and for many years its president, Gen. W. T. Martin. Undaunted by difficulties, he successfully encountered all the vexations and grappled with all the problems that arose during the ten years of construction, and, we might add, without receiving the emoluments which are usually thought to be consequent upon the position of a railroad president. The company was chartered in 1870, and the first subscription to its capital stock was made in the following year by Adams county, which voted to subscribe for $600,000 of the stock and issue its bonds to pay therefor. The legality of this subscription was afterwards questioned, and by a compromise settlement it was reduced one-half. The corporation was then permanently organized; and as only a comparatively trifling amount of stock was then or at any time afterwards subscribed by individuals, Adams county had practically exclusive control of the enterprise. With the money obtained by discounting these county bonds and with funds borrowed on its own obligations and mortgages at ruinous rates of interest, the railroad crept along from Natchez to Jackson, building by piecemeal, and so slowly that the equipment of sections first built was old and worn out before the road was completed, and the interest on its indebtedness amounted to almost as much as the cost of the road.

In 1880 the city of Natchez was induced to vote a subscription of $225,000 to the capital stock, conditioned on the guaranty of the railroad to pay the interest and principal on the city's bonds as they matured, and thus prevent any levy of taxes to pay them. This subscription is assailed by complainants as *ultra vires,* and the guaranty of the railroad company and the

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issuance of the mortgage bonds to secure such guaranty are attacked as beyond the power of the corporation.

Before the railroad was completed to the Hinds county line, the county of Hinds voted a subscription of $200,000 to the capital stock of the company, but to be used only in payment for the construction of the road within the county. Thus the bonds of the county to pay for the subscription did not become available until 1882. Meanwhile the stock of the company was greatly embarrassed, and, having no credit, it procured certain of its directors in Natchez to lend their credit to the company by executing their accommodation notes, aggregating $150,000, to be used by the company as collateral security. These notes were obtained on a nominal sale of stock to the amount of $1,-500,000, being on the basis of ten cents on the dollar, and issued subject to the right of the company to repurchase it within some short fixed period at a slightly advanced price. By the hypothecation of these accommodation notes and of this stock and by pledging the undelivered Hinds county bonds, the needed loan was secured. In connection with the issuance, sale, and hypothecation of the stock and bonds of the company, it is well to note that the charter of the railroad company authorized it to borrow money upon its own credit for the purpose of constructing and maintaining the railroad, and to issue its corporate bonds or promissory notes, and to mortgage its railroad and franchises, and to sell, dispose of, or negotiate its bonds and corporate stock at such prices as, in the judgment of the company, evidenced by the voice of two-thirds of the directors, would best advance its interests, and if such bonds, notes, or stock should be sold at discount, the sale should nevertheless be valid for the par value thereof.

In January, 1883, matters being in the general condition above described, the company, through its president, and pursuant to an order of its directors, entered into a contract with Jos. W. Drexel, by which, in consideration of the company's obligation to pay $304,000 in twelve months and a transfer and

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delivery to Drexel of 30,000 shares ($1,500,000) of stock of the company and $1,250,000 of bonds secured by second mortgage on the railroad, Drexel turned over to the company certain bonds of the New York, West Shore & Buffalo Railroad Company, of the face value of $320,000, which could be sold and were sold by Gen. Martin, but at a discount of more than twenty per cent. The agreement with Drexel further stipulated that, upon default in the payment of the company's obligation, all of the stock and bonds hypothecated should become the absolute property of Drexel, upon the further condition that he should pay off all the outstanding mortgages of the railroad company, estimated to be about $425,000. This transaction is characterized by complainants as a loan, and is assailed by them as usurious, and also illegal, on the ground that it was voted by the directors to provide a mode of payment of the debt secured in part by their own accommodation notes aforesaid and to pay the debt of the company growing out of its guaranty of the city of Natchez bonds. The note or obligation of Drexel was extended from year to year, but meanwhile the city of Natchez was being pressed and importuned by the holders of its bonds; and the railroad company obtained another loan on short credit from Morris K. Jesup, trustee for Drexel, to pay off the bonds of the city of Natchez. These were paid, and the mortgage bonds which had been pledged to secure performance of the company's guaranty in favor of the city were transferred, to be held as collateral for Drexel. Thus Drexel, through his trustee, held practically all of the stock of the company, except that owned by the counties of Adams and Hinds; and the right of the company to redeem, under its contract, having been lost by default, Drexel claimed the absolute ownership of the stock and bonds. Thereupon the directors, on May 6, 1887, waived the right to redeem, and by a formal order directed the reissuance and delivery of the said amount of stock to such persons as might be indicated by Jesup, which was done. The latter then, in execution of his part of the contract, procured a surrender to

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the company of all the outstanding mortgage notes and bonds which he had conditionally assumed to pay. Thus Drexel and Jesup and their appointees came into the ownership and possession of a controlling interest in the Natchez, Jackson & Columbus Railroad Company, and at the succeeding annual meeting, in January, 1888, dictated the selection of the directory. At the same meeting T. J. Nichol became president of the company instead of Gen. Martin.

In March, 1889, the Drexel and Jesup stock and bonds were sold to the Financial Improvement Company, a construction company organized and controlled by the shareholders of the Louisville, New Orleans & Texas Railroad Company; and the control of the railroad company thus passed to those identified in interest, if not in name, with the company. On February 19, 1890, on the procurement of the officers of the Louisville, New Orleans & Texas Railroad Company, the act of 1890 (Laws 1890, p. 675, ch. 502) was passed, authorizing the sale of the Natchez, Jackson & Columbus Railroad, or its consolidation with the Louisville, New Orleans & Texas Railway Company. Soon after the passage of the act the directors of the Natchez, Jackson & Columbus Railroad Company met, and, by the unanimous vote of the directors who were present, accepted the provisions of the act, and made a sale of the railroad and other property and the franchises of the company to the Louisville, New Orleans & Texas Railway Company, and directed the necessary conveyance to be executed. The directors also called a meeting of the stockholders to consider the matter of ratification of the sale, and at the meeting of the stockholders thus called the action of the directors was ratified. There was only one stockholder—the owner of fifty-four shares—who voted in the negative. The deed was thereupon executed, and the Louisville, New Orleans & Texas Railway Company (now, by consolidation, the Yazoo & Mississippi Valley Railroad Company) took exclusive control of the railroad and other property of the Natchez, Jackson & Columbus Railroad Company.

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We have given a mere outline of the history of the railroad, stating only so much as we think necessary to a proper understanding of the legal principles which must be decisive of the controversy.

The first ground of attack on the sale is that, while the act of 1890 gave the Natchez, Jackson & Columbus Railroad Company authority to sell, the Louisville, New Orleans & Texas Railway Company had no authority under the act or under its own charter to buy. It is sufficient as to this to say that whatever complaint might be made by creditors of the selling corporation or stockholders of the purchasing company or by the state in its sovereign capacity, this objection cannot be made by the selling company or its stockholders. *Fritts* v. *Palmer,* 132 U. S., 282 (10 Sup. Ct., 93; 33 L. ed., 317); *Union National Bank* v. *Mathews,* 98 U. S., 621 (25 L. ed., 188); *Ohio Railroad Co.* v. *McCarthy,* 96 U. S., 258 (24 L. ed., 693). See, also, *Quitman County* v. *Stritze,* 70 Miss., 320 (13 South. Rep., 36).

The next objection is that the act of 1890 was an amendment of the charter of the Natchez, Jackson & Columbus Railroad Company, and, being fundamental in its nature, it could not be operative until accepted by all of the stockholders. We are aware of the rule announced by many courts that, even although the right is reserved in the state to repeal, alter, or amend the charter, an amendment which fundamentally changes the nature of a corporation cannot be imposed upon it if any of the stockholders dissent. This rule, if correct, has no application in this case. Even in the absence of express statutory power, a private corporation doing a losing and unprofitable business may sell its entire assets upon a vote of a majority of the stockholders. *Berry* v. *Broach,* 65 Miss., 450 (4 South. Rep., 117, citing Morawetz on Priv. Corp., sec. 413); Wood's Field on Corp., sec. 445; Cook, Stock & Stock., sec. 668. It is true that a railroad corporation has *quasi* public functions. but where the state, by a valid statute, has assented to the sale,

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as in this case, all difficulty on this account is removed. Whatever interest the public might have in the continued ownership and operation of the road by the corporation, this interest was certainly committed to the control of the legislature. *Treadwell* v. *Salisbury Mfg. Co.,* 7 Gray, 393 (66 Am. Dec., 490); *Black* v. *Delaware Canal Co.,* 22 N. J. Eq., 130.

It is not denied that the sale was approved by a majority of the stockholders present and voting, but the point is made that the stock held and voted by the Financial Improvement Company and its appointees was illegally issued and wrongfully acquired by Drexel and Jesup and their assignees, and could not be lawfully voted. There does not seem to have been any concealment from stockholders or the public of any of the facts or circumstances connected with the issuance, hypothecation, or sale of this stock. Whatever right other stockholders might have had to question the validity of this stock, the county of Adams cannot be heard to complain. By virtue of its ownership of a majority of the stock, it had virtual control of the company from its organization in 1871 until 1882; and after that, until 1887, the counties of Adams and Hinds together controlled the company. At every meeting of stockholders from 1872 to 1889, Adams county was represented by the president of its board of supervisors, and all the acts of its officers and directors were reported to and ratified by the stockholders. The county of Adams, by the president of its board of supervisors, participated in the issuance of this stock; and it was by its consent, if not by its active procurement, that the stock was placed with Drexel and Jesup. Consequently the county cannot object that the owners exercised the right incident to ownership of voting the stock at the stockholders' meetings. It thus becomes unnecessary to decide whether the appointment of Gen. Martin to represent Adams county stock was invalid because not entered on the minutes of the board of supervisors. Due notice of the meeting was given; and even if Adams county was not rep-

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resented, it was bound by the action of the majority of the stockholders.

The case in favor of Hinds county seems to be in no better attitude. After its acquisition of the stock, it was represented at nearly all of the meetings of the directors and stockholders. It is true that the persons assuming to act for it as stockholders were in many instances not appointed by the order of the board entered on its minutes. But, as stated above, we do not think it necessary to decide whether their appointment to vote the stock of the county had to be evidenced of record, for the county was accorded the right to elect one or more persons to represent it on the directory of the company, and during the whole time of its ownership it was so represented on the directory by persons appointed for the purpose by formal orders entered on its minutes. One of the conditions of the subscription to the stock by Hinds county, as appears from the minutes of the board of supervisors, was that the county should be secured representation on the board of directors of the company. The county appointed men for the very purpose of acting as directors, and they were invited by the company to act, and did act, as such, and by their votes and their acquiescence authorized and ratified the very transactions as to the loans and the issuance and disposition of the stock now the subject of complaint. The resolution in the directors' meeting on March 28, 1890, accepting the act of 1890 and directing the sale of the railroad, was introduced by H. C. Roberts, who was acting as a director in the company by the appointment of the board of supervisors of Hinds county, regularly entered on its minutes; and, as if to remove all doubt as to his power under the charter to act for the county and serve as a director, it had caused a nominal amount of its stock to be transferred to him. In determining how far the county of Hinds was bound by the acts of Roberts, it must be borne in mind that the counties did not own and hold their stock in a governmental capacity. This we held in *Adams County* v. *Railroad Company*, 76 Miss., 714 (25 South. Rep., 667). It follows neces-

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sarily from the views announced in that case that the county of Hinds held the stock in the same way and subject to the same rights and obligations as purely private corporations or individuals. Incident to this right as owner was the right to appoint such agents to represent its interests as the nature of the property or the business required. The legislature, in providing, as it did in sec. 20 of the charter of the railroad company, that the board of supervisors might appoint any person it saw fit to vote its stock, was merely declaring a right which the county would possess in the absence of a statute—a right incident to its ownership of the stock. It is immaterial by what name the agent was called, if in fact he was duly appointed to represent the county, and did in fact represent it. The fact that in his appointment, on the minutes of the board, he was called a "director," and was accorded and exercised all the functions of a director, sufficiently indicates the scope of his authority. Surely the agent of a private corporation, so appointed and so acting, would bind his principal. So we must hold the county of Hinds bound by the acts of Roberts. *Berry* v. *Broach, supra.*

The cause of appellants has not lacked for ability and zeal of counsel. The transcripts and briefs are exceedingly voluminous, and we have not undertaken to discuss *seriatim* or in detail all of the points presented, many of which are correct as abstract legal propositions. All the material questions presented are determinable in the light of the principles above announced.

The decree of the chancery court is affirmed.

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GULF & SHIP ISLAND RAILROAD COMPANY v. FLORIAN C. FLOWERS ET AL.

NEW TRIAL. *Equity. Judgment fraudulent in effect. Injunction.*

Where the plaintiff's attorney caused defendant's attorney to believe and act upon the idea that a case would not be tried at the next term of the justice's court, but would be continued, a judgment taken by the plaintiff himself, in the absence of the defendant and his attorney at said term, is fraudulent in its effect, and after the defendant, being without fault, has lost the right of appeal, will be enjoined and a new trial will be granted in equity, although the plaintiff's attorney acted without intent to deceive.

FROM the chancery court of Jones county.

HON. JAMES L. MCCASKILL, Chancellor.

The railroad company, appellant, was complainant, and Flowers and others, appellees, defendants in the court below. From a decree dissolving an injunction on bill, answer, and affidavits, the complainant appealed to the supreme court.

Flowers instituted suit before a justice of the peace, Jeffcoat, and a summons was issued thereon commanding the railroad company to appear and make defense on the 4th day of June, 1904.

Hearst, an attorney for the railroad company, started from his place of business, Hattiesburg, to the place of trial on that day. The place of trial was on the Saratoga-Laurel branch of the railroad company's lines. Hearst, the attorney, took the train for the place of trial, a station called Savage. While on the train, and before he reached Savage, he was advised by a lawyer, whom he met on the train, that plaintiff's attorney had caused the case to be continued until the next term of the justice's court, wherefore he did not leave the train at Savage, but went on to Laurel, where he met Flowers' attorney, who

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assured him that the case had been continued, and he went home, abandoning all idea of the case being tried on that day.

The bill charged that the defendant had a perfect defense to the suit. It appeared, however, that in the absence of the attorneys of both parties, the justice of the peace, on plaintiff's demand, rendered a judgment in favor of the plaintiff against the railroad company, of which the railroad company was not advised until after the time had expired for prosecuting an appeal therefrom.

McWillie & Thompson, and *E. J. Bowers,* and *James H. Neville,* for appellant.

Even if we concede that Flowers, the plaintiff, had the right in spite of the wishes of his attorney to insist upon a trial of the case before the justice of the peace on the return-day of the summons, yet this does not go to the marrow of the suit. Surely the acts of Halsell were calculated to and did mislead Hearst, the railroad's attorney, and the railroad company, and caused them to be put off their guard in the matter of an appeal, although it was not intended that they should do so. The chancellor seems to have proceeded on the theory that Flowers had a right in spite of his attorney to demand a trial of the case, and to overlook, or to attach no significance to, the fact that the railroad company was deceived by the plaintiff's attorney, and thereby lost its right to appeal from the judgment of the justice of the peace. The right of appeal having thus been lost, the appellant, the railroad company, is without any recourse whatever, unless it be heard on the merits of its suit touching its right to a new trial, which new trial, under the circumstances of this case, ought to be granted by the chancery court.

According to the affidavits, both for the complainant and the defendant, the railroad company was misled and deceived, and thereby lost its right to appeal, and the chancellor should have overruled the motion to dissolve the injunction, and passed the whole subject-matter until the merits of the controversy could

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be inquired into, on the final hearing, after both parties had had opportunity to fully make out their case by proofs.

R. E. Halsell, for appellees.

The proof utterly fails to establish any fraud on the part of Flowers or his attorney; in fact, the affidavit for Flowers and the affidavit for the railroad company set up almost the same facts.

Appellant's attorney was guilty of laches. He left Hattiesburg at ten o'clock in the morning, the very hour when he should have been at court, traveled eighty miles to court, and got there at 1:30 P.M., and, instead of stopping at the place of holding court, passed right on by, and went to Laurel and saw appellees' attorney, who told him he did not go to the court. In no way did appellees' attorney attempt to deceive Mr. Hearst.

Flowers certainly had the right to have his case tried and to conduct it without his attorney, if he so chose, and should not be deprived of his judgment on account of the carelessness of appellant. There is absolutely no hint or proof of fraud on the part of Flowers or the justice of the peace.

Where there is no fraud proven, but, on the other hand, appellant's own affidavit shows him negligent and guilty of laches, relief will be denied him in equity. *Brooks* v. *Shelton,* 47 Miss., 234; *Newman* v. *Morris,* 52 Miss., 402.

CALHOON, J., delivered the opinion of the court.

There is no question whatever in this case of the good faith of Flowers or his attorney. The sole question is whether it would not be a fraud to permit the judgment to stand. This record presents a situation where a judgment by default was had which is fraudulent in its effect, but not in its design.

It is conceded here that the railroad attorney took the train for the place of trial before the justice of the peace, but, having information on the train that the attorney for Flowers would not be there and that it would be useless to go, he passed the

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place of trial, went on to Laurel, and saw the attorney for Flowers, who told him he would not be at the place of trial, and that he "had written to Mr. F. C. Flowers, his client, and had also written the justice of the peace, that he could not be there at the trial on that day, and to continue the case." The railroad attorney, when told this, went on home, though having then time to go to the place of trial on that day, and did not hear of any judgment until ten days after its rendition, too late to appeal. Flowers had the letter from his attorney, but did not continue the case, but himself took a judgment by default. The execution of this judgment was enjoined, and the injunction should not have been dissolved. The railroad attorney had the right to rely on the statement of the attorney for Flowers; and, there being no dispute between counsel as to the facts above stated, the injunction is retained, the decree dissolving it reversed, and the cause remanded for further proceedings.

Reversed and remanded.

George LeHote, Receiver, etc., v. Haywood A. Boyet et al.

Corporations. *Insolvency. Receiver. Laborers' wages. Preference claims.*

Where a receiver is appointed for an insolvent corporation, whether public or private, and its entire property is placed in his hands, he will be required to pay the wages of laborers who rendered service shortly before his appointment and whose labor was necessary to continue the business of the corporation and preserve its property, in preference to both ordinary and mortgage creditors.

From the chancery court of Hancock county.

Hon. James F. McCool, Chancellor.

Boyet and one hundred and five other persons, the appellees, laborers, petitioned the chancery court in a case therein pending

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in which was being administered the estate of an insolvent private corporation, which had been engaged in the manufacture of lumber, showing that they were creditors of the corporation for wages due them as laborers, and praying that the receiver, LeHote, the appellant, be ordered to pay them in preference to all other creditors. From a decree granting the prayer of the petition, the receiver, LeHote, appealed to the supreme court.

It appeared that the insolvent corporation had made a partial assignment for the benefit of its creditors, including the appellees, which did not give preferences, but it recognized existing liens on the property conveyed, and that it was indebted to each of the petitioners on account of wages due them as laborers, the aggregate sum being $2,049.50; that the labor was performed at various dates between April 1, 1904 (the earliest date), and July 7, 1904, and that the service of these laborers were necessary to continue the business and preserve the property of the corporation. The receiver was appointed July 9, 1904.

T. M. Miller; E. J. Bowers, and *D. B. Chaffee,* for appellant.

It would seem to be enough to say that inasmuch as the law of the state providing liens contained no provision in favor of laborers which would apply to any of the assigned property, and inasmuch as the assignment itself was for the equal benefit of all creditors and is not assailed, no preference can be allowed these appellees over the others.

The effect of the decree here, if permitted to stand, would partially nullify the assignment and would create a lien at the same time where the statutes, which undertook to deal with the entire policy, give none.

It is not denied, and cannot be denied, that the Favre Lumber Company had a perfect right to assign its property for the payment of all its creditors. The effect of the assignment was, therefore, to vest the title to the property in trust for all creditors, including the petitioners themselves. The circumstance

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that the trustee resigned or abandoned the trust produced a condition which rendered the action of the court a matter of necessity, and not of grace; for it is a maxim of equity that no trust will be permitted to fail for want of a trustee.

The cases relied on by counsel, and accepted as authoritative by the chancellor, were those where, in the first place, the labor by "hand-to-mouth" people had been rendered to keep alive some valuable franchise, and where the parties seeking the benefit of the court's discretion in the appointment of a receiver, as incidental to a foreclosure proceeding, were the beneficiaries of the labor. A sort of equity of subrogation, in short, was worked out against them in favor of a meritorious class of supposedly needy employes, based very largely upon the notion that inasmuch as the court was not absolutely bound to appoint a receiver, and thereby put the property out of the reach of legal process in favor of the labor claimants, it had the power to annex, as a condition of interfering with the possession of the mortgagor, as it were, that the mortgagee should submit to a preference in favor of such worthy persons. Here there was no attempt to take property out of the hands of the debtor defendant; the same had already been so lawfully disposed of as to render it inaccessible to the laborers by any process save in a suit where fraud or other illegality could be successfully charged against the assignment.

The case considered the leading one on the subject is that of *Fosdick* v. *Schall,* 99 U. S., 235, which related to a claim against a railroad company for the rent of cars. And in speaking of the power of the court, in the absence of a lien, to apply the revenues in the hands of the receiver to its payment to the prejudice of a mortgage, the court said, *inter alia:* "The power rests upon the fact that in the administration of the affairs of the company the mortgage creditors have gotten possession of that which, in equity, belonged to a whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which

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they have thus inequitably obtained" (referring to earnings and betterments).

In that case, as well as in the case of *Hale* v. *Frost,* 99 U. S., 389, and *Burnham* v. *Bowen,* 111 U. S., 776, it appeared that the claims allowed against the receiver of the railways would have been paid in due course of business from the earnings, if the mortgagor's possession had continued uninterrupted by the receivership, whereas here there was no possession of the original owner disturbed by a receiver, and there was no longer any chance for the debts to be paid.

We think that an examination of the cases relied on by opposing counsel will develop that there is no room here for the equity applied as a matter of grace and as a supposed condition of asking equity and thus diverting funds from the ordinary use the owner would have made of same if permitted to remain in their administration.

The Alabama case relied on proceeds on the same principle, and only goes beyond the supreme court of the United States in applying it to a corporation not exclusively operating a public franchise.

Another matter is to be observed in the cases where the claims of persons furnishing labor and material to keep the railroad going were paid by preference over the mortgages from the income in the receiver's hands, and that was the consideration that notwithstanding default in the payment of interest, entitling the mortgagees to foreclosure, the latter had allowed the property to remain in the hands of the company and had allowed the latter to contract the claims for the betterment of the road—a species of fraud on the creditors, who, presumably, would not have advanced credit except upon the faith of the income being applied to the payment of current expenses.

In *Woods* v. *Guarantee Trust & S. D. Co.,* 128 U. S., 421, the supreme court said: "The doctrine of *Fosdick* v. *Schall* has never been applied in any case except that of a railroad. The case lays great emphasis on the consideration that a railroad is

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a peculiar property, of a public nature, and discharging a great public work. There is a broad distinction between such a case and that of a purely private concern. We do not undertake to decide the question here, but only point it out."

In no case has a purely private corporation in the hands of a receiver been charged with preferences that were not allowed by the state law; and as the law governing this class of corporations is essentially different in many respects from that governing *quasi* public corporations, the principles applied in the cases cited by our opponents have no application in law or reason to the case at bar.

W. J. Gex, for appellees.

If the assignment was valid, which we seriously question and deny, because of the fact that the parties signing same do nowhere show any authority delegated to them by the stockholders, or even from the board of directors, of said company to make the assignment—and certain it is that the secretary and president of any corporation have no such general powers—still, this would not affect the right of the chancellor to make the order, as entered in this cause, when he was subsequently called upon to appoint a receiver.

The assignment could not have the effect of prejudicing the lien or other security held by any creditor, still less could it have the right to restrict the jurisdiction of the chancery court, when the creditors themselves, as alleged in the petition for the appointment of the receiver, came into that court and prayed that a receiver be appointed in order to preserve the estate, the assignment being inadequate for that purpose.

Counsel say that the decree creates a lien when none is provided for in such cases. If they had been able to draw at any time during the progress of this litigation the distinction between a lien and a preference, this court would not now have this case before it. Counsel say, without citing any authority,

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that the appoinment of a receiver in this cause was a matter of right, and not of grace. All the law books and decisions say that the appointment of a receiver is always a matter of grace, and never a matter of absolute right. 23 Am. & Eng. Ency. Law, 1039, where in the notes the decisions of every state are reviewed. The rights of the appellees and the decree in their favor are abundantly supported by the highest authority. *Fosdick* v. *Schall,* 99 U. S., 235; *Hale* v. *Frost,* 99 U. S., 389; *Burnham* v. *Bowen,* 111 U. S., 776, 780, 783; *Union Trust Co.* v. *Morrison,* 125 U. S., 591; *St. Louis, etc., R. Co.* v. *Cleveland, etc., R. Co.,* 125 U. S., 657, 673; *Kneeland* v. *Loan & Trust Co.,* 136 U. S., 89; *Thomas* v. *Western Car Co.,* 149 U. S., 95; *Virginia, etc., Co.* v. *Central Railroad & Banking Co.,* 170 U. S., 355, 365, 368; *Railroad Co.* v. *Carnegie Steel Co.,* 176 U. S., 257.

True it is that the cases above cited were all railroad cases, and of necessity the decisions thereof do not set out specifically that the same principle would apply to private corporations in contradistinction to *quasi* public corporations; but it is to be noted that these cases, whenever they deal with the proposition as to whether the same principle would apply to private corporations, expressly refuse to pass upon same as set out in *Woods* v. *Guarantee Trust & S. D. Co.,* 128 U. S., 421, cited by appellant.

As the question whether the same principle could apply to private corporations has never been presented to the supreme court of the United States, and therefore never by it passed upon, we must look to the decisions of other courts of last resort to which the question was presented and passed upon.

The leading case on the principles of *Fosdick* v. *Schall,* as applied to private corporations, is the case of *Drennen* v. *Mercantile Trust & Deposit Co.,* 115 Ala., 592 (s.c., 23 South. Rep., 164), to which case we would most especially call the court's attention. *Dickinson* v. *Saunders,* 129 Fed. Rep., 16.

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Whitfield, C. J., delivered the opinion of the court.

We think this case falls squarely within the principles announced in *Fosdick* v. *Schall,* 99 U. S., 235 (25 L. ed., 339); *Burnham* v. *Bowen,* 111 U. S., 776 (4 Sup. Ct., 675; 28 L. ed., 596); and *So. R. Co.* v. *Carnegie Steel Co.,* 176 U. S., 257 (20 Sup. Ct., 347; 44 L. ed., 458), all of which relate to railroads; and *Drennen & Co.* v. *Mercantile Trust & Deposit Co.,* 115 Ala., 592 (23 South. Rep., 164; 39 L. R. A., 623; 67 Am. St. Rep., 72), and *Dickinson* v. *Saunders,* 120 Fed. Rep., 16 (63 C. C. A., 666), which relate to private corporations. The supreme court of Alabama, adverting to the distinction sought to be drawn there, as in this case, between the application of the principle to public or *quasi* public corporations, on the one hand, and private corporations, on the other, said in the case in 115 Ala., 23 South. Rep., 39 L. R. A., 67 Am. St. Rep.: "To state the proposition yet more concretely, the equity arises and is rested upon one or another of the three following categories or states of fact: First, that the gross earnings of the corporation before the receivership, to which its operatives and laborers and persons furnishing necessary supplies are, upon all the authorities, entitled in preference and priority to the bondholders, have been diverted from the payment of their wages and accounts and paid to the bondholders or are in the hands of the receiver, to be paid to the bondholders, or to be expended by him in the further operation of the corporation's works for the benefit of the bondholders, or have been expended, either before or after receiver appointed, in the improvement and betterment of the mortgaged property, whereby the security of the bonds is increased, to the obvious advantage and benefit of the bondholders. Or, second, that whether, strictly speaking, there has been any diversion of gross earnings from the employes, directly or indirectly, to the bondholders, or not, the operatives and laborers have performed services and labor in the improvement and betterment of the mortgaged property, so that such labor and services have inured directly to the

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benefit of the bondholders, in the enhancement of the value of their security, and hence of their bonds, they thereby securing, in addition to the property embraced in their mortgages, the value of the services of the company's operatives and laborers, which value belongs to such operatives and laborers, and would have been paid to them, it is to be assumed, by the corporation, out of its gross earnings, but for the intervention of the bondholders, and the appointment at their instance of the receiver." The third ground need not be stated. ". . . The fact that the corporation is of a public character does not enter into it, and is not an element of it, any more than such fact would be necessary to a recovery in trover for a horse converted by a corporation. Every element of this equity may exist as well against a private as against a public corporation, and against bond creditors of the one as well as the other. The right to be asserted is obviously the same, whatever the character in this respect of the corporation. The wrong done to the employes is the same—the misappropriation of the fund for the payment of their wages. And the remedy for the effectuation of the right and the redress of the wrong is applied upon considerations which take no account of whether the corporation whose earnings have thus been wrongfully diverted from the payment of its employes is a railroad company or a manufacturing company or a mining company. The diversion of the fund being shown and the equity being thus made to appear, the redress is accorded, the equity is declared and effectuated, by courts of chancery, upon the broad and beneficent maxim of equity jurisprudence, which imposes or authorizes the court to impose, upon every suitor asking equitable relief, the duty and burden of doing equity; and we have not heard or seen it suggested that this principle is applicable more to one suitor than another or more to a public than a private corporation. The necessity for the application of this equitable doctrine for giving preference to claims of employes for wages is doubtless more frequent in railroad cases, but that does not argue that the facts which

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authorize it cannot as well exist in other cases." "We have undertaken to state this doctrine as it has been declared in other jurisdictions, and there applied to railroad property, and to give our reason, on general principles, for the conclusion we have reached—that that limitation of the doctrine is unsound, and that, of consequence, in our opinion, the equity is as salutary and its effectuation is as practicable and necessary against the bondholders of a private as against those of a public corporation. The argument against this wide application of the doctrine which is based upon the supposed fact that such application has not heretofore been made is the same argument which stood in the way of the conclusion in *Fosdick* v. *Schall,* and was in that case entirely demolished in respect of railroad corporations and their property—the same argument, indeed, that has had to be met and overthrown in every new application of every new equitable principle, and which, had it been allowed to obtain and control, would have left England and this country without the splendid system of equity jurisprudence which now embellishes the jurisprudence of both countries. It may be, as suggested, that courts have been very stupid or very much at fault in not making an earlier application of these principles to cases like the present one; but, if so, it is the same stupidity which delayed the declaration of the doctrine of *Fosdick* v. *Schall,* that in the early ages failed to recognize the equity jurisprudence at all, and which, upon the eventual establishment of the court of chancery, stood in the way of the immediate development and application of all the principles of equity into a perfect system of equity jurisprudence, which has not even yet been attained. The broader application of the doctrine which we are attempting to justify, on what we regard as very plain and simple and elementary principles of equity, will not lead to, involve, or admit of any of the dire consequences which are suggested, as will be clearly seen upon reference to the limitations which those principles themselves involve, and which we have endeavored to state with care and precision. It will

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not take the place of mechanic's lien laws and the like nor obviate the necessity or policy of such enactments. It will not in any sense encroach upon vested or contractual securities or right. The principles upon which it rests, in the application of it which we are proposing, in and of themselves, mark a distinct line between the particular corporation cases to which it applies and the ordinary cases of mortgages on property, whether of individuals or corporations, to secure the payment of debts; and under it there is not the slightest danger of the secured creditor, in any case, losing anything which he is entitled to, on recognized principles of equity and good conscience." All which seems to us eminently true. We prefer, however, resting the jurisdiction on the second ground stated by McClellan, C. J.

Affirmed.

WALTER JACKSON ET AL. v. PORT GIBSON BANK ET AL.

1. **CHANCERY PRACTICE.** *Quieting title. Bill of complaint. Code* 1892, § 501.

   A bill in equity to confirm title to real estate and to cancel and remove clouds therefrom is demurrable, if it fail to comply with Code 1892, § 501, providing that the complainant in such a bill must deraign his title, and that a mere statement that he is the real owner of the land shall be insufficient, unless good and valid reason be given for the failure.

2. **SAME.** *Concrete case.*

   Such a bill charging that the defendant had executed a deed of trust conveying the land as security for a debt, that default had been made in the payment of the debt, and that the deed of trust had been foreclosed and the lands purchased by complainant at the trustee's sale, does not comply with said statute, since it makes no reference to the trustee's deed and does not deraign the complainant's title, and gives no reason for the failure.

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FROM the chancery court of Claiborne county.

HON. WILLIAM P. S. VENTRESS, Chancellor.

The Port Gibson Bank and another, the appellees, were complainants, and Jackson and others, appellants, were defendants in the court below. The suit was to confirm title to real estate and to cancel and remove clouds therefrom. The defendants demurred to the bill of complaint, and from a decree overruling the demurrer they appealed to the supreme court.

The complainants charged in their bill that respondents had executed a certain trust deed conveying the lands described in their bill; that default had been made in the payment of the debt, and that the deed of trust had been foreclosed, and the lands bought at the sale by one of them and leased by the purchaser to his co-complainant, and that respondents refused to surrender possession. Nothing was said in the bill about the trustee's deed. The prayer was for the cancellation of the claim of respondents as a cloud upon complainants' title.

F. A. Polsey, for appellants.

The bill nowhere alleges that complainants, or either of them, ever received a deed from the trustee, or that complainant bank ever, at any time, held so much as even a color of title, legal or equitable, to the land from which they so summarily seek to eject the defendants. On the contrary, the bill itself shows that defendants had a good title and were in rightful possession.

Now, what sort of a support is such a showing for so far-reaching a prayer, or for the issuance of a drastic writ of assistance? This court in *Chiles* v. *Gallagher*, 7 South. Rep., 208, said: "There is no more serious and prevalent error than that which seems to exist in relation to the rights of parties to exhibit bills to cancel clouds upon titles. It is frequently assumed that if a complainant can show some antecedent claim, however vague and unsubstantial, he may assail and dispel anything which is a cloud upon the real title. We cannot conceive

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what has given rise to this erroneous view, for it is settled by an unbroken current of decisions that to enable a complainant to cancel the defendant's title as a cloud, he himself must show as perfect a title, legal or equitable, as would enable him, the title being a legal one, to recover against the defendant in an action of ejectment." And again, in *Wilkinson* v. *Hiller,* 14 South. Rep., 442 (where the opinion is supported by no less than fourteen Mississippi citations), this court said: "If anything can be considered settled by decisions, it is that a complainant seeking to cancel the title of his adversary must show either a good legal or equitable title in himself. . . . On the final hearing the chancellor should have dismissed complainants' bill, which will now be done here."

C. A. French, on the same side.

The demurrer in this case should have been sustained, if for no other reason, because the Port Gibson Bank *et al.,* who were complainants below, did not deraign their title to the land in controversy sufficiently as is required by Code 1892, § 501. *Long* v. *Stanley,* 79 Miss., 298. In the case at bar the complainants and defendants both claimed the land in controversy from a common source, and the complainants did not by their bill of complaint, with the exhibits thereto, show a perfect title. Therefore the complainants did not show by their bill of complaint that they were entitled to the relief prayed for.

E. S., J. T., & H. W. M. Drake, for appellees.

It is contended in this court that complainants did not deraign their title sufficiently as required by Code 1892, § 501. The object of this section is simply to put the defendants in possession of such information as will give them a clear idea of complainants' title and will enable them to investigate the same. Before the passage of the section referred to, it was sufficient for the complainant to simply charge that he was the owner of

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the property named, and such an averment in the bill was held sufficient to give the chancery court jurisdiction. We find but one case construing this statute—viz., *Long* v. *Stanley*, 79 Miss., 298. Under the ruling in that case a deraignment of title from defendant is sufficient, and we have so deraigned title—viz., we set out a trust deed from defendants, foreclosure of same according to its terms, and purchase by complainants at the foreclosure sale. It is objected by appellees that the proof of publication and deed from the trustee should have been made exhibits, but there is no rule anywhere requiring this. The bill charges that the trust deed was foreclosed according to its terms, and its terms provide for an advertisement in a newspaper, for a public sale to the highest bidder for cash, and contain a mandatory provision requiring the trustee to execute a deed to the purchaser. The charge of a foreclosure according to the terms of the trust deed charges that all these things were done, and a charge that complainant bought at the sale is a charge that the deed was made to it as purchaser, conveying the lands contained in the trust deed. It is sufficient to put the defendants on notice of complainants' claim. The newspaper was required to be a public one and was open to examination by defendants and their counsel. The deed from the trustee was actually on record, and defendants could make no complaint on the score that the bill did not disclose the source of complainants' claim.

WHITFIELD, C. J., delivered the opinion of the court.

The demurrer to the bill should have been sustained. There was no such deraignment of title as is required by Code 1892, § 501, which was expressly enacted for the purpose of changing the rule in *Cook* v. *Friley,* 61 Miss., 1. The case falls squarely within the rule of *Long* v. *Stanley,* 79 Miss., 298 (30 South. Rep., 823). The bill does not even set out the chain of title which the complainants allege they hold under the respondents.

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The deed from the trustee was an essential muniment of title, and should have been set out in the bill.

The decree is reversed, and the cause remanded, with leave to amend the bill within sixty days from the filing of the mandate in the court below.

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WILLIAM C. SULLIVAN ET AL. v. YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

1. EMINENT DOMAIN. *Special court. Justice of the peace. Code* 1892, § 1680. *Mandamus.*

   In presiding over a special court of eminent domain, created by Code 1892, § 1680, the justice of the peace acts ministerially rather than judicially, and he may be controlled by mandamus.

2. SAME. *Jurisdiction of circuit court. Meeting of eminent domain court. Time and place.*

   The circuit court is, however, without power to fix tne time and place for the meeting of the eminent domain court, and in awarding mandamus it should simply command the justice of the peace to reconvene the special court and proceed according to law.

3. SAME. *Former proceeding. Res adjudicata.*

   A railroad company, having the right to condemn private property for public use, is not precluded from so doing by the fact that a former proceeding to condemn the same land had been dismissed by the justice of the peace, and that a petition for mandamus to require the justice of the peace to proceed in the cause, filed in the name of the state on the relation of the attorney-general, for the railroad's benefit, had been dismissed on demurrer in the circuit court.

FROM the circuit court of, second district, Tallahatchie county.

HON. SAMUEL C. COOK, Judge.

The railroad company, appellee, was plaintiff, and Sullivan, a justice of the peace, and others, appellants, were defendants

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there. The action was a mandamus proceeding, and from a judgment awarding the writ the defendants appealed to the supreme court.

In August, 1903, the Yazoo & Mississippi Valley Railroad Company filed with the clerk of the circuit court a written application for the condemnation of certain land in Tallahatchie county for public use. On this application a summons and writ was issued for the organization of a court of eminent domain. The justice of the peace and the jurors selected assembled on the day fixed in the writ, and the defendants, the property owners, appeared by counsel and demurred to the application and writ. The demurrer was sustained by the justice of the peace and the proceeding was dismissed. Afterwards the state of Mississippi, by its attorney-general, filed a petition in the circuit court, on his own relation, for the benefit of the Yazoo & Mississippi Valley Railroad Company, reciting the foregoing facts, and alleging that the action of the justice of the peace was illegal and improper, and praying for a writ of mandamus directed to the justice of the peace, Sullivan, to require him to proceed with the eminent domain court. To this petition Sullivan, the justice of the peace, demurred on the grounds, *inter alia*, that the petition was that of the state by its attorney-general, instead of being the petition of the Yazoo & Mississippi Valley Railroad Company, and that the matter of the condemnation of land for the use of the railroad company was not such a matter affecting the public interest as warranted a proceeding by the attorney-general. The circuit court sustained the demurrer, and the petition was dismissed, from which judgment an appeal was taken in behalf of the railroad company to the supreme court, but it was afterwards dismissed. In October, 1903, the Yazoo & Mississippi Valley Railroad Company filed its new or second written application with the clerk of the circuit court of Tallahatchie county, where the land was located, asking for the issuance of a writ and summons for the organization of an eminent domain court to condemn

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the same lands. The writ was issued by the clerk, directed to Sullivan, justice of the peace of the district where the land was located, requiring the service of summons on the jurors who had been drawn. On the proper day the court was organized, and the defendants, the landowners, appeared by counsel and filed several pleas, one of which was *res adjudicata*, based on the proceeding had in the other case. A motion to strike out the plea was overruled, and an order was entered reciting, "Having heard argument upon said motion, and considering that the plea of *res adjudicata* is a good plea, the court doth overrule the motion, dismiss the application, and decline to proceed further in the cause," wherefore the jury was discharged. Afterwards the Yazoo & Mississippi Valley Railroad Company filed its petition in this case in the circuit court of Tallahatchie county for a writ of mandamus directed to the justice of the peace, Sullivan, and to the jurors who had been impaneled in said eminent domain court, compelling them to proceed with their duties in the matter. The defendants appeared and filed a demurrer to this petition, assigning as causes of demurrer that the court was without power by mandamus to compel the defendant Sullivan, who presided at the eminent domain court, to decide the question raised in his court in the way to be indicated by the circuit court, or to review his actions as judge of the eminent domain court in a mandamus proceeding; that the matters determined by the justice of the peace in the eminent domain court were judicial questions for him to determine on the pleas filed, and the circuit court by mandamus had no power to control his discretion or review his judgment rendered. Upon motion the court struck this demurrer from the file upon the ground that it was frivolous. Defendants then offered to file other pleas to the merits of the petition, setting up special matters of defense, and the court refused to permit them to be filed. The court entered an order awarding the writ of mandamus, directing the justice of the peace and the jurors to reassemble at a certain time and place named, and to proceed

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as the law directs to assess the damages sustained by the parties interested in the land sought to be condemned, and ordering the justice of the peace to have other competent jurors summoned in case the jurors already selected failed to appear.

Harris, Powell & Harris, and *Brewer & Creekmore,* for appellants.

In speaking of the exercise of power of eminent domain, Lewis, in his book on that subject, sec. 253, says: "The authority must be strictly pursued. This is a proposition so universally considered and so often reiterated by the courts that it requires no discussion. We shall simply refer to some of the principal cases illustrating the doctrine." In sec. 254 he says: "Statutes giving authority to condemn are strictly construed. All grants of power by the government are to be strictly construed, and this is especially true with respect to the power of eminent domain, which is more harsh and peremptory in its exercise and operation than any other. 'An act of this sort,' says Bland, J., 'deserves no favor. To construe it liberally would be sinning against the rights of property.'"

All of this is familiar learning, and it is not necessary for us to cite authorities on this line.

We refer the court to the chapter of the code on the subject of mandamus. Sec. 2846 provides: "The writ of mandamus shall be issued by the circuit court commanding any inferior tribunal, corporation, board, officer, or person to do or not to do an act in performance or omission of which the law specially enjoins, as a duty resulting from an office, trust, or station where there is not a plain, adequate, or speedy remedy in the ordinary course of law."

The chapter on eminent domain prescribes precisely the manner in which an eminent domain court should be constituted, assembled, or organized, and the first step is the filing of the petition with the circuit clerk and appointment by him of a justice of the peace and the drawing by the circuit clerk, in

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the presence of the sheriff and chancery clerk, of a jury, who, together with the justice of the peace, shall constitute the court of eminent domain. The justice of the peace and the jurors, as well as the parties defendant, are to be summoned by the circuit clerk to assemble at the time and place to be designated by him. No power whatever is given to the justice of the peace to summon the jury, or any part of it, or to summon the parties, or to issue any writs whatever. The law enjoins no duty of this character upon him any more than it enjoins it upon the jurors. It is not a duty resulting from the office. The summons is issued not only by the clerk for the jurors, but also for the justice of the peace, and there is nowhere in the statute any power given the justice of the peace, either expressly or by implication, to assemble the jury. The action of mandamus in this state is purely a statutory proceeding, and it only lies to compel the performance of an act which the law enjoins as a duty resulting from office.

Now it will be seen that in the case at bar the eminent domain court had been dissolved, the jury had been dismissed, and the court had become *functus;* it was gone, it no longer existed. The petition asks the circuit court not only by its writ to assemble the court to confer the powers upon the justice of the peace which are not enjoined upon him by the eminent domain chapter and which he does not possess. We quote from the prayer of the petition, which prayer was granted: "That upon the failure of any of the jurors to assemble, the said Sullivan, justice of the peace, shall have other jurors summoned so as to duly organize the court of eminent domain." "That the justice of the peace give notice to all the parties shown by the application of the time and place of the assembling of said justice of the peace and jurors."

There is no authority or duty imposed by law upon the justice of the peace to summon the jurors or to summon the parties. He has no power whatever to issue any writs, and this power could not be conferred upon him by mandamus.

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Notwithstanding the fact that the authorities are firmly fixed that the statutory directions for exercising the power of eminent domain court must be strictly followed, we have here the circuit court by a writ of mandamus assembling the court, whereas the statute provides that this court shall be assembled by the sheriff under writs issued by the circuit clerk; and the circuit court goes further and confers powers upon the justice of the peace which, by law, he does not possess, directing him to perform duties which are not enjoined upon him by virtue of his office; and we insist that this judgment on these grounds should be reversed. If the clerk of the court, after the petition had been filed, should refuse to issue writs as required by law, the court could by writ of mandamus compel him to issue them. If, after the writs had been placed in the hands of the sheriff, he refused to execute them, the court, by its writ of mandamus, could compel him to do so, but the court cannot confer the powers upon the justice of the peace which are not given him by the statute.

The justice of the peace is with the jury a constituent part of the court, charged by the statute with the duty of giving an instruction and making certain entries. He has no power to assemble a jury in the first instance or to reassemble one after it has been discharged, whether rightfully or wrongfully.

It is manifest that the court below in acting upon this demurrer was proceeding upon the idea that the eminent domain court could not consider any question going to the right of the petitioner to condemn the land; that it must proceed, whether they had the right or not, and the justice must give instruction prescribed by law, and that he could do nothing else; that his powers were limited to that and to that alone. In this we do not concur. Is it to be held, regardless of the right or the authority of the petitioner to exercise the power of eminent domain, that the court must proceed to award damages, that it could consider no question whatever, although it might be manifest from the face of the paper that the party had no right or

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authority whatever? Suppose a private individual, without any shadow or pretense of right to exercise the power of eminent domain, should file a petition and have the court assembled, and the petition should show upon its face that it was for a private, and not for a public, use that the condemnation was sought, must the justice of the peace proceed and instruct the jury to award damages and make the entries prescribed by the statute in the face of this? Cannot this question be settled by the justice of the peace of the eminent domain court *in limine?*

Cannot the jurisdictional facts be raised in the eminent domain court? The eminent domain court has jurisdiction only in those cases where the person or corporation applying has the right and states that right with certainty. It has no jurisdiction where a person has no right and does not state a right.

The question as to the right of eminent domain is made by the constitution a judicial question, and this question when settled by the eminent domain court cannot certainly be reviewed in a mandamus suit.

We insist that the eminent domain court has a right to determine *in limine* the question of its jurisdiction, and this discretion cannot be controlled by a writ of mandamus. *Monroe County* v. *State,* 63 Miss., 135; *State Board* v. *West Point,* 60 Miss., 638; *Clayton* v. *McWilliams,* 49 Miss., 311; *Vicksburg* v. *Rainwater,* 47 Miss., 547; *Swan* v. *Gray,* 44 Miss., 383; *Attala Co.* v. *Grant,* 9 Smed. & M., 77; *Madison County* v. *Alexander,* Walker, 533.

Mayes & Longstreet, and *J. M. Dickinson,* for appellee.

It is patent at a glance that the condemnation of land for the private use of a railroad corporation is not a matter of such general public interest as to bring it within that class of cases which the attorney-general of this state is authorized by law to institute and prosecute in his name for the benefit of third persons. The whole proceeding instituted in the name of the attorney-general was improperly conceived, and the action of

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the circuit judge in refusing to issue a writ of mandamus on the petition of the attorney-general in such a matter, and of his refusal to consider the matter in vacation, were eminently correct and proper.

While the taking of lands under condemnation proceedings by railroad companies for their proper uses has uniformly been held to be a taking for public use, still the taking in itself is not a right to be exercised by the attorney-general of the state for the benefit of the railroad company, but by the railroad company itself, in its own name and on its own responsibility, under the charter or under the general law.

The duties of the justice of the peace presiding over the special domain court, under ch. 40, Code 1892, are ministerial rather than judicial. The justice of the peace is vested with no authority for the convening or organization of a special domain court under this chapter. His duties are clearly defined by sec. 1680, which expressly provides that the justice of the peace and the jury, constituting together the court, shall only exercise the jurisdiction and power enumerated in the chapter. The form of the instruction by the justice to the jury is given, and the only judgment the justice may enter is set out in sec. 1692.

The justice is not vested with any judicial power effectual to dispose of the case without the intervention of the jury, by the provisions of ch. 40. The justice and the jury, acting together, merely constitute a board of assessors, and the whole purpose of the chapter is to secure an assessment of value and damages and to make a complete record of condemnation and judgment, so that either party, feeling aggrieved, may appeal to the circuit court, which is vested with general jurisdiction to hear and determine all issues and to enter all proper judgments.

Under the former provisions for condemnation proceedings the sheriff was required to impanel the jury and to control the body during its deliberations; certainly the sheriff had no

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power to judicially determine any general question of jurisdiction or of law determinate of the controversy during the course of the trial. The absence from ch. 40 of authority to the justice to judicially determine any of the material questions which might arise, which would go to the very essence and gist of the controversy, does not render the statute unconstitutional, because there is adequate remedy provided by appeal to a court of plenary and general jurisdiction, with power and authority on the trial of all issues *de novo* to enter all proper judgments.

It has been held that any person aggrieved by any wrongful action had under color of eminent domain proceedings may obtain protection by injunction if the proceedings were void, or if the statute under which the condemnation was had did not authorize appeals from judgments in such cases; but the same authorities hold that where provisions for an appeal are made to a court of general jurisdiction and authority to determine all questions, there is no violation or denial of essential rights, and no injunction will lie, but the proceedings must be prosecuted to a final conclusion in the court of general jurisdiction.

Section 17 of the constitution did not, *ex proprio vigore,* invest the justice of the peace with all the powers and jurisdictions of a court of general record. If the statute had provided that the president of the board of supervisors should conduct the proceedings, they would have been as valid as where the provision is that the justice of the peace shall do so. Therefore the action of the justice of the peace, in sustaining the demurrer interposed in the first proceeding and in sustaining the plea of *res adjudicata* interposed by defendants in the last proceeding, was unauthorized and improper.

We submit to the court that after the improper action of the justice in passing on demurrers in special pleas and in sustaining one or the other, the railroad company was without remedy, except by mandamus. Section 1696 of ch. 40 simply gives the right to appeal to the circuit court from the

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findings of the jury. The whole chapter contemplates that the justice and the jury shall discharge the duties imposed upon them by the law, and it is only from the final judgment and findings of the jury that an appeal is granted. There were no findings of the jury or final judgment on the merits in either of these proceedings. One of the component factors of the eminent domain court—namely, the justice of the peace—merely rendered a judgment disposing of the case on a matter about which he had no right to adjudicate, and then declined to perform his duty further and abandoned the court.

In the absence of action by the jury in assessing values and damages, there could be no appeal, and had there been an appeal, the circuit court would have made the condemnation, while the domain chapter specifically provides that this right should be exercised as provided in that chapter and be made by the special tribunal therein provided for.

The circuit court is not vested with original jurisdiction without the intervention of the special domain court to make the condemnations. Reasoning on general questions is unnecessary in the face of the express provision of the statute, which only grants the right of appeal from the actual findings of the jury. *Certiorari* would not have been an effectual remedy. On *certiorari* the court is confined to questions of law appearing on the face of the record; and if it is possible, it shall enter such judgment as should have been rendered, or, if all the facts are not shown, may try the case anew. Code 1892, § 89.

Suppose in the case at bar the record had been taken to the circuit court by *certiorari*. The circuit court, examining the record and settling the questions of law arising on the face of it, would, we will assume, have decided that the action of the justice of the peace was wrong and unauthorized. Then what result would have followed? It could not have proceeded to try the case anew, because there was no condemnation below, no ascertainment and declaration by the jury of the questions of values and damages. The circuit court would have been

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powerless to try the case *de novo* on these issues, and, therefore, all that the circuit court could have done in any event would have been to say that the action of the justice of the peace in dismissing by his sole act the petition was wrong.

The railroad company would have then been in the same plight exactly that it was in when the petition for the mandamus was presented to the circuit judge. If the circuit court, on the *certiorari*, should have said the proceedings were void, it had no power to command the justice to continue or to reconvene the special eminent domain court.

The remedy by *certiorari*, under sec. 89, and even as liberally construed by our own court in extending the remedy to all possible cases, would have been wholly ineffectual to provide for a determination of the issues raised in the condemnation proceeding or to have compelled the justice to proceed with his duties.

The action of the circuit judge in granting the writ of mandamus was evidently correct. When the justice of the peace assumed authority to determine as a preliminary question and to sustain the plea of *res adjudicata*, and thereupon refused to proceed further with the cause, he simply vainly attempted to do a thing he could not do, and had no power or authority to do; that was to dissolve the court. His action did not amount to a dissolution of the court. The court of special eminent domain could not be so dissolved under the law. The court had been duly organized and the jury impaneled. The action of the justice in refusing to proceed with the court and attempting to dissolve the same was illegal, and had the effect only to suspend the procedures.

A special court of eminent domain has no fixed terms which, by their expiration, render the court *functus officii*. The court convenes on the day fixed, and after it is properly organized it continues to be in force and operation until the duties imposed on it by law are performed.

Suppose justices of the peace and jurors, legally summoned

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to constitute a special court of eminent domain, should, through prejudice or for any other reason, refuse to discharge their duties, refuse to meet, refuse to obey the mandates of the law, the inevitable conclusion would result, if such conduct was allowed, that there could never be a condemnation proceeding, simply because the special agency, provided by law, could not be availed of.

And, again, if the contentions of defendants are sound, then any justice of the peace, at any time, on any pretext, could dismiss a petition for condemnation of land, attempt to dissolve his court, and leave the railroad company without remedy, either by direct appeal, by *certiorari,* or by mandamus. The law has provided a special tribunal for the condemnation proceedings, has put in this tribunal and none other the power to consummate this condemnation and to protect the rights of persons affected thereby. It is the sole and exclusive course of procedure provided by Code 1892. Preferably, it is the course the law desires and declares shall be pursued. And yet to say that a justice of the peace, summoned only as a part of this tribunal and having his powers and duties clearly defined and marked out, could by any action on his part cut off the public agency with power to make condemnation, from any legal acquisition of rights of way, would be a travesty on the law.

WHITFIELD, C. J., delivered the opinion of the court.

We do not think that a justice of the peace, in eminent domain proceeding, has any judicial function to perform. He acts ministerially only. Every step which he is to take is precisely marked out by the statute. The objection that he ought to be permitted to decide whether he has jurisdiction, or judicially to pass upon any other question, is more plausible than sound. It results from the very nature of the case that the procedure is summary—as, for example, no appeal is allowed except from the findings of the jury—and it is perfectly obvious

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that a *certiorari* could effect nothing in this sort of case. Formerly the sheriff organized this court. The justice of the peace is simply substituted for the sheriff. The plea of *res adjudicata,* of course, was not good. All the proceedings instituted in the first suit were void. But we think the order of the circuit judge went too far. The clerk of the circuit court is directed by the law to fix the time at which, and the place where, the court of eminent domain is to meet, and to summon eighteen men from whom the jury is to be selected. We do not think the circuit judge had power to fix the time or place, in his order, for the reconvening of the eminent domain court or to direct the justice of the peace to have other competent parties summoned as jurors. The true view, in our judgment, of this muddled situation is simply this: That, the eminent domain court having been regularly constituted and organized, all that has been since done amounts to a mere suspension of its functions, and it is enough for the circuit judge, in awarding mandamus, to command the justice of the peace to reconvene his court and proceed according to law.

Reversed and remanded, with instructions to modify the order as indicated.

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ESTHER COMENITZ ET AL. *v.* BANK OF COMMERCE.

1. JUSTICE OF THE PEACE. *Judgment. Process. Service. Time.*

The judgment of a justice of the peace rendered in a civil case against a defendant, not a non-resident or transient person, upon less than five days' service of process, is utterly void. (For the exception of non-residents and transient persons, see Code 1892, § 2399.)

2. SAME. *Judgment against two or more. Entirety. Void as to one, void as to all.*

The judgment of a justice of the peace, rendered in a civil case against two or more defendants, is an entirety, and being void as to one, is void as to all of them.

FROM the chancery court of Harrison county.

HON. THADDEUS A. WOOD, Chancellor.

Comenitz and others, appellants, were complainants, and the Bank of Commerce, appellee, was defendant in the court below. From a decree sustaining a motion to dissolve an injunction, the complainant appealed to the supreme court.

The Bank of Commerce brought suit against Comenitz and a number of others, the appellants, in a justice of the peace's court. Service of summons was had on Comenitz on the 19th day of September, 1903, and on the other defendants, now complainants and appellants, in said suit, several days before that date. Judgment was taken by default against all the defendants, now complainants and appellants, in said suit, on the 23d day of September, 1903. Subsequently an execution was issued by the justice of the peace who rendered the judgment, and placed in the hands of the sheriff, who levied on some personal property belonging to the defendants, now complainants and appellants, in said suit. The defendants, now complainants and appellants, in said suit, all joined in the bill in this case, charging the above facts, among others, and praying for a writ of injunction restraining the plaintiff in execution, the Bank of

Commerce, and the sheriff from proceeding under the execution issued on the justice of the peace's judgment, alleging that it was void because taken by default when defendant thereto, Comenitz, had been served with summons less than five days before the judgment was rendered. Answer was filed by the bank, and a motion was made and sustained to dissolve the injunction. There was no pretense that Comenitz was a non-resident or transient person, and she was not proceeded against as such in the justice's court.

Harper & Harper, for appellants.

The taking of the judgment against Mrs. Esther Comenitz made the judgment void as to each and all of the defendants. In the case of *Hulme* v. *James,* 55 Am. Dec., 775, Hemphill, C. J., says: "The judgment is void as against Burtridge, and, as it is indivisible in its nature, it is necessarily void as against the other defendants."

See also *Sherrard* v. *Nevins,* 52 Am. Dec., 508, and note 510, where other cases are collected. The principal case cited, *Long* v. *Garnett,* 45 Tex., 401, is to the point that a judgment is not divisible. Numerous authorities might be cited from other states, but we will turn confidently to our own Mississippi decisions. Judgment not on personal service taken at the first term of the court has been uniformly held to be void. *Herman* v. *Stricklin,* 60 Miss., 237. It has likewise been uniformly held that a judgment taken on personal service, with less than five days' personal service, is also absolutely void. *Calhoun* v. *Matlock,* 3 How. (Miss.), 72; *Jones* v. *McGahey,* 1 How. (Miss.), 128; *Gibson* v. *Currier,* 35 South. Rep., 315.

Barber & Mize, for appellee.

Before appellants can be heard to complain in a court of equity they must first have done all they possibly could have done in a court of law to rid themselves of what they claim to be an erroneous judgment.

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Comenitz did not appear in court on the return-day of the summons, though she had four days' notice. While it was not incumbent on her to appear on that day, yet, by § 2401, Code 1892, she should have appeared at the term next after the one to which said summons was returnable, as the service on her required her under said section to do. She failed to appear either to contest the action or to move the court to set aside what she claims to be an erroneous and void judgment, which she had a right to do.

Appellants also failed to appeal to the circuit court, which they should have done if they felt themselves aggrieved by the judgments of the justice's court. They did nothing but lay by until the five days for appeal had elapsed; nay, they did nothing for more than six months. In fact, they did nothing until execution was issued against them on said judgment. Is a case conceivable where parties have been more derelict in looking after their own interests? They seem to have an idea that they can come into a court of equity and ask that court to do for them what they could have done for themselves in a court of law.

What were the duties of appellants before they could be heard in a court of equity? As to Jacobs, there is a valid judgment against him, he having been served with the required notice before the rendering of said judgments and not having appeared to contest same. What was his duty if he felt aggrieved? Plainly to appeal to the circuit court. Having failed to do this, he has no standing in a court of equity. As to Comenitz, it was her duty to have appeared at the term of the justice's court next following the term to which the summons was returnable. *Newman* v. *Taylor,* 69 Miss., 670. Or she could have appealed to the circuit court.

A defendant against whom a judgment by default has been rendered at the return term, service of summons having been made less than five days before the return term, shall make a motion at the term of said court, next succeeding the return term

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of the summons, to vacate said judgment. *Meyer* v. *Whitehead,* 62 Miss., 387.

If a defendant against whom a judgment at law has been rendered without service of process seeks relief in the chancery court, he must show not only want of notice, but that he has a good defense to the cause of action. He must do equity. *Stewart* v. *Brooks,* 62 Miss., 492; *Newman* v. *Taylor,* 69 Miss., 670. And these two cases are conclusive on the case at bar.

We invite the close attention of the court to the principles of law therein announced, believing that they govern each and every question involved in this case.

Argued orally by *A. Y. Harper,* for appellants, and by *E. M. Barber,* for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

The judgment was absolutely void as to appellant Comenitz, and, being an entirety, was void as to all the defendants. This is the well-settled Mississippi doctrine.

The decree is reversed, cause remanded, with instructions to reinstate the injunction and make it perpetual.

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ALICE JENKINS v. EVON M. BARBER ET AL.

1. SOLICITORS IN CHANCERY. *Inconsistent positions.*

A defendant to an equity suit whose position is in fact adverse to that of another defendant cannot act as the latter's solicitor, unless, if at all, there be an express authorization placed of record for him to do so; and in the absence of such an authorization a decree rendered by consent of the solicitor defendant will be reversed on the appeal of his co-defendant for whom he assumed to act.

2. SUPREME COURT PRACTICE. *Record. Affidavits.*

An affidavit not a part of the record cannot be considered by the supreme court in aid of the same.

FROM the chancery court of Harrison county.

HON. STONE DEAVOURS, Chancellor.

Barber, an appellee, was complainant in the court below; Mrs. Jenkins, the appellant, and Maybin, an appellee, were defendants there. From a decree in favor of Barber and Maybin (one a complainant and the other a defendant), the complainant appealed to the supreme court. The opinion of the court fully states the facts of the case.

Harper & Harper, for appellant.

The court went off on the theory that W. H. Maybin was the attorney of Alice Cooper, and a motion was docketed in which leave to withdraw the answer of defendants was asked. Through carelessness or inadvertency, we presume, no order was entered granting this leave to withdraw the answers. But if the order had been drawn and entered, it would have been error on the part of the court, because W. H. Maybin's interest in this litigation was hostile to that of Alice Cooper, and the law would not permit him to represent her. Besides, the record does not purport that Maybin was her attorney. Maybin had no author-

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ity to withdraw the answer of Alice Cooper, and the case yet stands on bill and answer.

In the case of *United States* v. *Throckmorton,* 98 U. S., 61, Mr. Justice Miller, delivering the opinion of the court, says: "If the court has been mistaken in law, there is remedy by writ of error. If the jury has been mistaken in the facts, there is the same remedy by motion for a new trial. If there has been evidence discovered since the trial, a motion for a new trial will give appropriate relief. But all these are parts of the same proceeding, relief is given in the same suit, and the party is not vexed by another suit for the same matter. So in a suit in chancery, on proper showing a rehearing is granted. If the injury complained of is an erroneous decision, an appeal to the higher court gives opportunity to correct the error. If new evidence is discovered after the decree has become final, a bill of review may be filed on that ground within the rules prescribed by law on the subject. Here again these proceedings are all parts of the same suit, and the rule framed for the repose of society is not violated.

"But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue of this case—where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court by a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side. These and similar cases, which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hear-

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ing. See Wells, Res Adjudicata, sec. 499; *Pearce* v. *Olney,* 20 Conn., 544; *Wierich* v. *DeZoya,* 7 Ill. (2 Gilm.), 385; *Kent* v. *Richards,* 3 Md. Ch., 396; *Smith* v. *Lowry,* 1 Johns. Ch., 320; *DeLouis* v. *Meek,* 2 Green (Iowa), 55."

This principle proves that we are not only entitled to relief from the final decree entered in the chancery court of Harrison county by direct appeal, but under the facts if the time had expired for an appeal, we might have attacked the decree complained of in an original bill; or, in other words, the decree is absolutely void.

Barber & Mize, for appellees.

The assignment of error, based on the taking of the *pro confesso* while an answer was on file, cannot avail the appellant, because the decree *pro confesso,* granted by the court, recites that the answers of respondents had been withdrawn, and thereby conclusively shows that the motion of respondents asking leave to withdraw said answers had been sustained by the court. It is not necessary for the record to show a formal order sustaining the motion. It is not even necessary for the record to show a formal decree *pro confesso.* In *Cole* v. *Johnson,* 53 Miss., 94, it was held that the recital, "It appearing to the satisfaction of the court that judgment *pro confesso* had been duly and properly taken against the adult defendants in this cause," was sufficient to uphold final decree against the defendants.

"A final decree for complainant, otherwise correct, will not be reversible merely for failure to take a *pro confesso* decree against a defendant who has not answered." *Hambrick* v. *Jones,* 64 Miss., 240.

Even if it had not been recited in the decree *pro confesso* taken by the appellee that the answers of respondents had been withdrawn, but appellee had taken a decree *pro confesso* not containing this recital, a final decree based thereon would be good; for the appellate court will presume that the lower court sustained the motion requesting the withdrawal of respondents'

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answers, as the proceedings of the lower court are presumed to be regular unless otherwise shown. The rule in equity, as at law, is that in the absence of all the testimony on which the lower court acted, it will be presumed that everything was established. *Smith* v. *Fletcher*, 11 S. W. Rep., 224.

It must be presumed that Maybin was then the attorney of record for Alice Cooper, as was really the case. In fact, this is nowhere denied by appellant. The supreme court must presume that Maybin appeared in the court below as attorney for appellant, and that his name was on the docket as appellant's attorney, with appellant's consent, or the lower court would not have recognized any motion of his or any act of his in appellant's behalf.

"The entering of appearance by an attorney is *prima facie* evidence of his authority to appear." 1 Am. & Eng. Ency. Law (1st ed.), 952.

"It is not necessary to show the authority until called for." *Banks* v. *Fellows,* 28 N. H., 302; 1 Am. & Eng. Ency. Law (1st ed.), 953.

CALHOON, J., delivered the opinion of the court.

E. M. Barber filed a bill, in his own name alone, making W. H. Maybin and the appellant parties defendant thereto. This bill charges that Barber & Maybin were partners, to whom, as such partners, appellant gave a note, and executed a trust deed to secure it, payable to said Barber & Maybin, and that the note is past due and unpaid and has been lost or destroyed, and that the firm has been dissolved; and the prayer is that the land on which the trust deed was given be sold to pay the debt, and that of the proceeds sixty-two and one-half per cent be paid to Barber, and thirty-seven and one-half per cent be paid to the defendant, Maybin. To this bill there appears an answer by W. H. Maybin, which answer admits the execution of the note and trust deed, but sets up that at the dissolution of the firm of Barber & Maybin this note and trust deed, by agreement, be-

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came the sole property of Maybin, and denies that Barber has any interest in them. There also appears the answer of the appellant, averring her understanding that the note was payable to Maybin only, and that she had told Barber that she did not desire his services, and that she never employed him directly or indirectly, but repudiated his connection with the case. Her answer further avers that she is not indebted to Barber to any amount whatever, and that if he ever had any interest in it, the same went to Maybin on the dissolution of the firm of Barber & Maybin. On this answer it is plain that no decree should be rendered against appellant in favor of Barber without evidence; and it is also plain that no decree could be rendered against her in the cause in favor of Maybin, shaped as it is. Appellant's answer does not appear to have been filed through the intervention of any attorney whatever. We next find a motion to the court in the following words:

"*E. M. Barber* v. *Alice Cooper et al.* Now come defendants and move the court to allow them to withdraw their answers in the above-styled case. [Signed] W. H. Maybin, per Joe H. Mize."

Mr. Maybin, being in a position adversary to Mrs. Cooper, who now by marriage has become Mrs. Jenkins, of course could not act as her counsel, unless, if at all, upon express showing by the record of such authorization.

We next find in the record, without any disposition whatever of this motion, another motion for a decree *pro confesso* in the cause, and afterwards a decree reciting that it was on the motion for the decree *pro confesso,* and reciting that, "it further appearing that said Alice Cooper and W. H. Maybin have withdrawn their answers to said bill of complaint," it was decreed that the bill be taken as confessed against both defendants; and next we find a final decree, without proof, establishing the debt, and ordering the sale of the land to pay it, and this final decree gives four-sevenths of the proceeds to Barber, and three-sevenths to Maybin—a proportion differing from the claim of this bill—

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and saddles all the costs of the suit on appellant. There having been no disposition of the motion to withdraw the answer of appellant, in the peculiar attitude of this suit the court had no right to enter a final decree against her for the joint payment to Barber & Maybin and to saddle all the costs on her. It may be that appellant has a perfect defense to any proceeding on the part of Maybin, and she had the right to have Barber's claim against her settled in the orderly administration of justice.

After appellant had taken her appeal on this record, Mr. Maybin filed in this court an affidavit to the effect that he had been employed by appellant as a practicing attorney to represent her in that cause, and that, by an agreement between appellant, Barber, and himself, the answer of appellant was withdrawn by him through Mr. Joe H. Mize, and that the motion was accordingly made by Mize, the then partner of Barber, and that this was done with appellant's knowledge and consent. Of course no affidavit can be heard to help out a record, and so we can take no notice whatever of Mr. Maybin's affidavit in the disposition of this case.

Reversed and remanded.

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MARGARET FARMER ET AL v. JOHN M. ALLEN.

1. APPEALS. *Supreme court. Plea in bar. Statute of limitations. Code* 1892, § 2752.

   A plea in bar of an appeal, based on the statute of limitations, Code 1892, § 2752, providing that appeals to the supreme court shall be prosecuted within two years next after the rendition of the judgment or decree complained of, may be filed in and passed upon by the supreme court.

2. SAME. *Decree for sale of land. Erroneous description. Effect on pendency of suit.*

   Where in a suit for the sale of lands a decree was rendered, purporting to be final, condemning the lands described in the bill to sale, but erroneously describing them by giving the wrong section number, the decree, while erroneous, is not void, and upon its rendition the suit ceased to be a pending one; and an appeal therefrom was, as to all persons not under disability, barred two years after its rendition.

3. PARTITION SUIT. *Dismissal. Defendants' rights.*

   Where defendants, because of an erroneous description of land in what was regarded for years as a final decree in a partition suit, seek to have the cause in which it was rendered treated as a pending one, and the complainant asks, in the event it be so treated, that the cause be dismissed, the defendants cannot complain of a decree purporting to dismiss it without prejudice to their rights to bring any other suit they may see proper.

FROM the chancery court of Lee county.

HON. HENRY L. MULDROW, Chancellor.

Allen, the appellee, commonly called "Private John Allen," was the complainant in the court below; Mrs. Farmer and others were defendants there. From decrees favorable to complainant, defendants appealed to the supreme court. The opinion of the court fully states the facts of the case.

Anderson & Long, for appellants.

The petition filed by the surviving defendants on June 24, 1904, is in the nature of a bill of revivor, and was filed on the

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idea that all the decrees and orders made in the cause in the years 1886–87 were absolutely void and of no effect, and that, therefore, it was still a pending, undetermined cause. The theory of counsel was that, on account of the long time it had laid in court and on account of the death of one of the defendants, a bill of revivor, or in the nature of such a bill, was necessary in order to proceed with it to a final determination. Under our statute, Code 1892, § 914, there is no such thing in this state as a discontinuance of a cause. *Palmer* v. *State,* 73 Miss., 780; *Insurance Co.* v. *Francis,* 52 Miss., 457; *Tucker* v. *Wilson*, 68 Miss., 693.

The latter case was begun in 1870, and, after trial in court below, went to the supreme court and was reversed, and not another step was taken in the case until about twenty years afterwards, when some of the parties filed a bill in the nature of a bill of revivor. The supreme court held that it had been a pending suit all the time, and should be proceeded with as if a long time had not elapsed.

It was contended in the court below that the cause should not proceed to a final determination without making the person in possession of the land now in controversy, claiming title through the void decree of sale made in 1886, a party; and the court, as we understood, held with that contention.

Our position is that the status of the case in 1886 is its status now. Nothing that has transpired since has any bearing on the issues presented by the original bill filed then. If it is the law that every person who sets up some sort of claim to land, subsequent to the bringing of a suit in reference thereto in the chancery court, must be made a party defendant before the cause can be proceeded with, then there might never be any end to the litigation.

The record in this cause shows that the purchaser at the sale made under the decree rendered in 1886 got no title. The sale was absolutely void so far as concerns the land in controversy in

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this cause. It was not sold. The bill sought to sell one lot of land, but a different lot entirely was sold.

At the time this sale took place, and up to Code 1892, there was no statute requiring a *lis pendens* notice; and under the law all persons were affected with such notice whether they had actual knowledge of the pendency of the cause or not. So it seems clear to us that those claiming by virtue of that sale would have no standing whatever in court. They would have no title, either by authority of the sale or adverse possession, and are therefore not even necessary nor proper parties.

The court below erred in dismissing this suit on the motion of the appellee. It was done on the idea that the appellee, who was the complainant in the original bill, had the right to control the suit, and dismiss it or not as he pleased. We are sure, as a matter of law, this is not true. The matter was in this condition: The original bill had been filed, process served, and all of the other proceedings had, as already shown to the court. The defendants, by their petition filed June 24, 1904, to revive the cause, had become the actual parties. On that petition process had been served on Allen. As a matter of fact, the defendants in the cause were the real complainants at the time the court dismissed it, and not the original complainant. In their petition they set up the substance of the original bill, and asked relief in the same; and the cause, in our judgment, could not be dismissed without their consent, under the circumstances of the case. The original complainant, after the filing of the petition referred to by the defendants, could not have been made liable for the cost. Especially is this true in view of the fact that he disclaimed any interest in the land by his motion to dismiss, as well as by the demurrer he interposed to, the petition. Our idea is that when a bill is filed for the partition of land, the defendants have a right to keep it in court until its final determination, notwithstanding one or all of the complainants may desire to dismiss it. The complainant has no more control over such a proceeding than the defendant. As

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to the right of complainant to dismiss his bill, we refer the court to the following cases, which we do not contend are directly in point in this case, but illustrative of the power of a complainant over the suit: *Trust Co.* v. *Fitzpatrick,* 71 Miss., 347; *State* v. *Hemingway,* 69 Miss., 491; *Duncan* v. *Robertson,* 57 Miss., 820; *Phillips* v. *Wormley,* 58 Miss., 398.

In this case the appeal is prosecuted from the decrees and orders made in 1886–87 as well as the final decree. This is done on the idea that the appellants have a right, notwithstanding the lapse of time beyond that allowed by statute for taking appeal from final decrees, to appeal from all the decrees and orders made in the case, regardless of how far back such orders and decrees were made.

If a cause is pending in court, say forty years, and certain decrees are made thirty years before the final decree, any party can, within the time prescribed by statute, after making the final decree, appeal to the supreme court, and there the whole record is reviewed, and any error appearing thereon, regardless of when it occurred, which is a reversible error, the court will notice and pass upon.

On the trial of this case in the court below it was contended that the equity principles that the appellants should come into court with clean hands, and should tender back the amount of purchase money received by them from the void sale of land, had some application to this case. We are unable to see what application these principles have. To whom should the money be tendered?

Harper & Potter, and *Allen & Robins,* for appellee.

Concede, for the sake of argument, that appellants are right in their contention that the final decree and proceedings thereunder in the original case were void, and that the case stands as if no final decree had been rendered, then the action of the court below in dismissing the original bill without prejudice, on motion of the complainant, was clearly within its discretion

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and power. The rule in reference to the right of complainant to dismiss his bill is stated in the case of *Trust Co.* v. *Fitzpatrick*, 71 Miss., 347, as follows: "The general rule is, indisputably, that a litigant may dismiss his complaint; the exception is, that he may not after decree or decretal order, nor after his adversary is entitled to a decree by proceeding in the particular suit. 'The plaintiff is allowed to dismiss his bill on the assumption that it leaves the defendant in the same position in which he would have stood if the suit had not been instituted; but that is not so where there has been a proceeding in the cause which has given the defendant a right against the plaintiff.' *Cooper* v. *Lewis,* 22 Eng. Ch. Rep., 177; *Insurance Co.* v. *Roberts,* 4 Sand. Ch. Rep., 734; *Bank* v. *Rose,* 1 Rich. Eq., 294; 1 Daniel's Ch. Pl. & Pr., 790."

If there had been, as appellants contend, no final decree nor decretal order, then they had certainly acquired no additional rights by the filing of the bill for partition and the proceedings thereunder, and appellee, Allen, had a right to dismiss his bill. The right of the defendants to have the land partitioned existed before the bill was filed, and the filing of the bill and the proceedings thereunder conferred no additional rights on them, and the dissmissal of the bill took no rights away from them, but left the parties to the suit in precisely the same attitude they were in before it was begun. This case, then, comes within none of the exceptions laid down by the authorities to the general rule that a complainant has the right to dismiss his suit.

It seems to us that the contention of appellants that this case stands as if no decree had ever been rendered, and as if no disposition had ever been made of it, is wholly without merit. Suppose, for the sake of argument, that the final decree is void, then the whole proceeding thereunder must fail. The court undertook to dispose of the case, and did all in its power so to do, and thereby it exhausted its jurisdiction of the subject-matter. A void decree ends the proceedings, except upon

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appeal, as effectively as any other. If the decree be void, then the only thing the defendants have to do is to ignore it or to appeal from it. But so far as the action of the court below is concerned, the case is at an end after the term of court at which the decree is rendered has expired.

An inspection of the record will convince this court that the final decree was, at most, merely erroneous, and not void, because the court had jurisdiction both of the subject-matter and of the persons; and so far as these persons, who are parties to the suit, are concerned, the decree is only erroneous, and not void, in that it misdescribes the land. It being merely an erroneous decree, the only way that the parties to the suit can complain is by appeal or by bill of review, in both of which rights they are barred, since the two-years' statute of limitations applies to both remedies.

However, the decree is not erroneous even on appeal, or rather the error in the decree was so manifestly a clerical error that it could and would be corrected at any time on a mere motion.

WHITFIELD, C. J., delivered the opinion of the court.

In 1886 appellee filed a petition in the chancery court of Lee county for the sale, for division of proceeds, of certain land, properly described in the petition as in sec. 34; the said appellee owning one-fourth, and the appellants two-fourths, of said land. At the November term, 1886, a decree was made ordering the sale of the land, describing it as "the property described in the bill of complaint—to wit," but the words "to wit" were followed by describing the land as in sec. 31, and it was advertised and sold as in sec. 31. The sale was reported to, and confirmed by, the court as being in sec. 31, and the proceeds were ordered distributed, and were distributed in accordance with the decree, and a report of that made and confirmed by the court, the whole suit being thus carried through and conducted to the usual, regular conclusion. At

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the sale one J. F. Booth became the purchaser, entered immediately into possession of the land, and received a deed describing it as in sec. 31, and has remained in adverse possession of it ever since. Nobody ever dreamed of any mistake as to the description of the land having been made until June, 1904, when a petition was filed in the chancery court of Lee county by the defendants in that suit (appellants here), reciting all that had taken place and giving notice to the complainant in the original case (J. M. Allen) that "it was the purpose of these petitioners to proceed with said case to final determination," and praying that, on final hearing, the said original suit should be revived and the said land in sec. 34 sold, and a division of proceeds made between J. M. Allen and the defendants. Allen demurred to the petition on the ground, chiefly, that the said original suit had long since been fully concluded and terminated, and was not therefore in any sense a pending suit, and also on the ground that Booth, the purchaser, was not made a party defendant to the petition, and that the appellants were estopped by the proceedings in the original case to question the sale without making the purchaser a party and offering to do equity by paying back the purchase money. This demurrer was sustained. Whereupon the appellants (defendants to the original proceedings) amended their petition. This amended petition was met by a motion on the part of Allen to dismiss the cause, if it could be considered as still pending, for the reason that he was in no way interested in the said land, and did not desire to prosecute the suit any further, or to be responsible for costs therein, being fully satisfied with the proceedings had in the original cause, and on the further ground that, if the defendants wished to proceed with litigation touching the said property, they should file an original bill. This motion was sustained and the whole proceeding dismissed without prejudice to any right defendants might have to file an original bill. Thereupon appellants appealed to this court from the decree sustaining said demurrer and the decree sus-

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taining said motion, and also appealed from the original decrees made in 1886 and 1887. As to these two last decrees, appellee interposes the statute of limitations, and the appellants have made a motion to strike out said pleas on the ground that this court is without power to entertain such pleas.

Dealing first with the motion, we have to say that it must be overruled. The pleas in bar of the appeals from the decrees in 1886 and 1887 were properly filed in this court. See *Parker* v. *Johnson,* 47 Miss., 632; *Hendricks* v. *Pugh,* 57 Miss., 157; and *Finney* v. *Speed,* 71 Miss., 32 (14 South. Rep., 465).

This is a unique case. It stands alone, "like Adam's recollection of his fall." The record shows not only that the appellee, like Shakespeare's greatest creature, was not only "witty himself, but the occasion of wit in others," but it also discloses the fact that he has humor of such pungent and vital quality that it can impart itself to the dry record of a partition suit, and, there embalmed, like the seed grain wrapped in the foldings of the mummy, survive for twenty years, to bloom and sparkle anew for "the gayety of nations!" Defendants in the original proceedings want the cotillon of the long ago resumed, and insist that Mr. Allen shall dance to them as his partners. Mr. Allen protests, insisting that the dance was long since finally concluded, its flowers faded, its music hushed, and that he will not be a party to a representation, in such ghostly fashion, of a drama long since acted. He says that the land was sold fairly, that the purchaser got the land really described in the bill and intended to be sold, and that he and the defendants got the purchase money of the land, and he insists upon the preservation of the *status quo,* and finds it impossible to derive any satisfaction in further reflection upon money received and long since spent. But to "leave this sharp encounter of our wits, and fall somewhat into a slower method," we observe, touching the legal points made: First, that the fundamental mistake made by the appellants in this proceeding is in supposing that the original suit is still a pending case. It is not

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a pending case at all. It is wholly unlike the case of *Tucker* v. *Wilson,* 68 Miss., 691 (9 South. Rep., 898), which last was a pending case at the time of that decision. There the case had been reversed in the supreme court in 1873; but as the costs had not been paid, the mandate never was sent to the court below, and nothing was ever done in the real case for fifteen years thereafter. The court held in *Tucker* v. *Wilson* that in the attitude of affairs the cause could be proceeded with from the point at which it was left when the court had reversed it fifteen years before. Manifestly, there was there a case still pending, and requiring to be proceeded with, after reversal, on the return of the mandate to the court below. Here the court did proceed with and did finally terminate the case in the chancery court of Lee county. If, as is insisted, in one view, the decree was void because the land was described in one part of the decree as in sec. 31, when it was in fact in sec. 34, then all appellants had to do was to ignore the void proceeding or to appeal from the decree; but we think that at the most the decree was erroneous, and not void. The land, the subject-matter of the litigation, was properly described in the bill and in the decree, in one part of it, which said that the commissioner should sell the land described in the bill; the court had complete jurisdiction both of the subject matter and of the parties; every step taken was in strict conformity with the law; and the mere clerical misprision in writing "31" for "34" was easily correctible by the record itself. But if there had been an appeal prosecuted from the final decree to this court, the judgment here would simply have been reversing the case, simply for this error, and rendering the same decree here, with the error corrected. Manifestly, it was the duty of the appellants to have appealed from these merely erroneous decrees within the time allowed by law. That they did not do, and the appeals from the decrees rendered in 1886 and 1887 have long since been barred. We therefore sustain the pleas filed in bar of these two appeals, and they are hereby dismissed.

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As to the decree sustaining the demurrer and sustaining the motion to dismiss the proceedings, we say: First—That, since the case was not a pending one, but a concluded one, the demurrer was properly sustained. Second—That, since the dismissal of the case was without prejudice to any rights the appellants may have to file a bill on their own behalf, it cannot be said the chancellor abused his discretion. We think he properly sustained the motion.

This petition simply prayed that the complainant should be required to proceed against them, the defendants, as if the suit had never been terminated, and that the land should be resold, and the proceeds a second time divided between Mr. Allen and appellants. Allen demurred, saying that the land had been sold once—this very land; that the purchaser had gone into possession, and had had it for twenty years; that he had got his part of the purchase money, and the appellants theirs; and that that ought to be the end of the matter. Logically, morally, and legally, we think that the right attitude; wherefore

The last two decrees are affirmed.

BENJAMIN C. DUNCAN, ASSIGNEE AND RECEIVER, v. STATE NATIONAL BANK OF ST. LOUIS ET AL.

ASSIGNMENT FOR BENEFIT OF CREDITORS. *Attack. Election of remedies. Participation in assets.*

Creditors who unsuccessfully attacked a general assignment made by a corporation for the benefit of its creditors on the sole ground that it had not been duly executed are not thereby precluded from participating in the distribution of the assets.

From the chancery court of Grenada county.

HON. JULIAN C. WILSON, Chancellor.

Duncan, the appellant, was the petitioner or complainant in the court below; the State National Bank of St. Louis and

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others, appellees, were defendants to Duncan's petition. From a decree adverse to Duncan he appealed to the supreme court.

[For reports of previous litigation touching or springing from the assignment involved, see *Bank* v. *Bank,* 83 Miss., 610; *Duncan* v. *Bank,* 84 Miss., 467; *Gerard* v. *Duncan,* 84 Miss., 731.]

The Merchants' Bank of Grenada made a general assignment of its property for the benefit of its creditors, making no preferences. Duncan, the appellant, was made assignee, and all creditors were made parties to the proceedings instituted by him in the chancery court under ch. 8, Code 1892. A master was appointed to adjust the claims, and the claims of appellees were allowed, and they were ordered by the court to be paid. After the entry of this decree, appellees filed a cross-petition, in which they assailed the validity of the assignment. The assignee answered the cross-petition, and that cause was tried in the chancery court, and on final hearing the cross-petition was dismissed, and the cross-petitioners appealed to the supreme court, and that decree was affirmed. See 83 Miss., 610 (35 South. Rep., 569). Afterwards Duncan, assignee, filed the petition in this case, making said cross-petitioners, the present appellees, parties thereto; setting up the fact that said parties had assailed the validity of the assignment; that at the time of the assailment of the assignment they were in full possession of all the facts; that the courts held said assignment valid; that the Merchants' Bank, the assignor, was insolvent, and the assets were not sufficient to pay all the creditors in full; and prayed that said cross-petitioners should not be permitted to participate in the distribution of the assets of the bank until the claims of all the other creditors were first paid in full, for the reason that they had repudiated the assignment.

W. C. McLean, for appellant.

Can a creditor for whose benefit a general assignment has been made be permitted, with full knowledge of the facts, to first

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assail and repudiate the assignment, and, when he fails in that attack, be permitted to then come in and claim under the assignment?

This is a new question in this court; and while the authorities are conflicting in some jurisdictions, yet we submit that not only the weight of authority, but the soundness thereof, is to the effect that a creditor for whose benefit an assignment is made cannot repudiate the assignment and then thereafter claim the benefits. This question is discussed at some length in the voluminous notes to *McLaughlin* v. *Bank,* 54 L. R. A., 345.

Because of the continuous, open, and hostile acts of the petitioner toward the assignment and his continuous refusal to accept its terms he is not in a position to claim benefits under it as other creditors who have assented to it are entitled thereto. *Adler, etc., Co.* v. *People's Bank,* 65 Ark., 280; *Valentine* v. *Decker,* 43 Mo., 583; *Jeffries' Appeal,* 33 Pa., 39; *Beifield* v. *Martin,* 4 Colo. App., 578; *O'Bryan Bros.* v. *Glenn Bros.,* 91 Tenn., 107; Burrell on Assignments, secs. 476, 479; *Fellows* v. *Greenleaf,* 43 N. H., 421; *Furman* v. *Fisher,* 4 Cald. (Tenn.), 626; *Farquaharson* v. *McDonald,* 2 Heisk. (Tenn.), 404; *Ewing* v. *Cook,* 85 Tenn., 332; *Vernon* v. *Morton,* 8 Dana (Ky.), 247; *White* v. *Sterling,* 11 Tex. Civ. App., 553; *Wright* v. *Zigler,* 70 Ga., 501; *Jones* v. *Burgiss* (Ala.), 19 South. Rep., 851.

Slack & Mitchell, and *Walter S. P. Doty,* for appellees.

Appellees had a final décree in their favor, and appellant took no steps to have same set aside at the term at which it was rendered, but permitted it to ripen into a final and unassailable judgment, and he could afterwards, if at all, attack it alone by bill of review. *Lagory* v. *Bayless,* 13 Smed. & M., 153; *Hardy* v. *Gohlson,* 26 Miss., 72; *Wiggle* v. *Owen,* 45 Miss., 691; *Ledyard* v. *Henderson,* 46 Miss., 260; *Cromwell* v. *Craft,* 47 Miss., 44; *McDougal* v. *McDougal,* 68 Miss., 689 (15 Am.

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St. Rep., 138); 13 Am. & Eng. Ency. Law (2d ed.), 40, and notes.

Before he could have filed his bill of review he must have made affidavit setting out the grounds upon which he relied and asking leave of the court to file the bill, and this appellant failed to do. *Vaughn* v. *Cutrer,* 49 Miss., 782; 3 Ency. Pl. & Pr., subject, "Bills of Review."

All parties interested in the decree sought to be set aside are necessary parties. All creditors of the bank were interested parties, and should have been joined in a proper proceeding to have this decree set aside. *Knowland* v. *Sartorious,* 46 Miss., 45; *Vaughn* v. *Cutrer,* 49 Miss., 782; 3 Ency. Pl. & Pr., subject, "Bills of Review."

The assignee-receiver had no authority to institute this proceeding without being directed to do so by the court or by the creditors of the bank. As to powers and duties of assignees, see *Richardson* v. *Stapleton,* 60 Miss., 97; *Shoe Co.* v. *Sykes,* 72 Miss., 390; *Hiller* v. *Ellis,* Id., 711.

The allegations of this petition are not sufficient to authorize the court to grant the relief prayed for. If he had authority to bring this suit, which we deny, he should have set out in his petition the amount of liabilities and collectible assets of the bank, and let the court be the judge of whether or not there would be sufficient funds to pay all the creditors. As it was, he did not and could not at that time set out these facts, because he did not then have the means of ascertaining them.

But aside from questions of procedure, pleading, etc., and admitting for the sake of the argument that this petition was properly filed, that the assignee-receiver had authority to institute this suit, and that the allegations of his petition are sufficient, yet he has no standing in equity, and the ruling of the lower court sustaining appellees' demurrer was right, and should be affirmed on the ground of the want of equity, because the petition does not show any legal or equitable grounds for the relief sought.

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Counsel for appellant in his brief says that there is only one question before this court—viz.: Can a creditor be permitted to first assail and repudiate the assignment, and then, failing, come in and claim under it? But we respectfully submit that this is not the only, nor indeed the proper, question at issue. In the first place, we maintain that the fact that appellees tested the validity of the assignment, as provided for by the chapter on assignments in Code 1892, is not a repudiation of the assignment. It would be monstrous to hold that, because a person properly came into court to test the validity of an instrument, he thereby repudiated it and elected not to claim under it.

There can be no election where a mistake is made as to the right to a certain remedy. *Madden* v. *Railroad Co.,* 66 Miss., 258; *Conn* v. *Bernheimer,* 67 Miss., 498; 7 Ency. Pl. & Pr., 364, and notes.

Most of the authorities which counsel for appellant cites and upon which he relies were where creditors attached the assigned property and were in a hostile attitude toward the assignment at the time they attempted to claim under it, and the courts held that, because of the continuous, open, and hostile acts of creditors toward the assignment and their continuous refusal to accept its terms, they were not in a position to claim its benefits, etc. This is the language of the Utah case cited and relied upon by him, and the Nebraska and Michigan cases use similar language. None of the cases cited by him, we respectfully submit, are in point or applicable to the facts of the case at bar.

For a full discussion of the doctrine of election and its application to the facts of a case, we call the attention of the court to the case of *Madden* v. *Railroad Co.,* 66 Miss., 273, where the court says: "There can be no denial of the doctrine of 'election' as an established rule of law, but, like its theological namesake, it is held and applied with many variations by the hundreds of cases in which it has been invoked." And after

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citing many authorities, including Kent, "*clarum et venerabile nomen,*" the court concludes: "Election is a matter of intention. It need not be expressed, it is true, but it will not be implied, except from some unequivocal act evincive of it," citing Story's Eq., sec. 1097.

To the same effect is the case of *Peters* v. *Bain,* 133 U. S., 295, which has been cited, and the definition and application of the doctrine of election therein given was approved and adopted by this court in the very recent case of *Barrier* v. *Kelly,* 82 Miss., 248. See also, on this subject, 54 L. R. A., 248, and notes; 3 Am. & Eng. Ency. Law (2d ed.), 136, and notes; Burrell on Assignments, sec. 476; 7 Ency. Pl. & Pr., 364, and notes, and cases there cited.

Argued orally by *W. C. McLean,* for appellant, and by *W. S. P. Doty,* for appellees.

WHITFIELD, C. J., delivered the opinion of the court.

The point decided in this case when it was here before—see *Bank* v. *Bank,* 83 Miss., 610 (35 South. Rep., 569)—was simply that these appellees, being mere general creditors, could not complain for the stockholders or the directors that the assignment had been illegally executed. We held that general creditors had no standing in court to make such an attack if the stockholders and directors all assented to the assignment. That was all that was involved in the former decision. No attack was made in that case on the assignment, treating it as having been legally executed, for fraud or anything else which would have avoided an instrument once having had legal existence. The sole object of the attack was to show that the assignment had never had any legal existence, and our former holding was that these appellees, mere general creditors, could not pursue this remedy. It was not a remedy which was open to them, if the stockholders and directors assented. This being the case, the doctrine of election is not properly involved in this appeal, and we do not decide the question with respect to the conse-

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quences of election to claim under or against an assignment. This case falls squarely within the principle of the cases of *Conn* v. *Bernheimer,* 67 Miss., 498 (7 South. Rep., 345); *Tucker* v. *Wilson,* 68 Miss., 693 (9 South. Rep., 898). In the former case Bernheimer employed the remedy of replevin, which was forbidden by the law, it being his duty to have interposed a claimant's issue. The holding was that, since Bernheimer could not employ replevin, the doctrine of election had no application.

Affirmed.

KING WILSON v. STATE OF MISSISSIPPI.

1. **FORGERY.** *Immaterial alteration. Code* 1892, § 1106.

   Under Code 1892, § 1106, defining forgery and confining the crime to instances where any person may be affected, bound, or in any way injured in his person or property, the mere alteration of the figures, following the character "$," in the upper right-hand corner of a draft, changing "$2.50" to "$12.50," does not constitute forgery where in the body of the instrument the sum ordered paid was distinctly written "two and 50-100 dollars," and this is especially true where the paper upon which the draft was written had distinctly stamped upon its face the words "Ten Dollars or Less," since the alteration was of an immaterial part of the instrument and could not injure any one.

2. **SAME.** *Attempt. Code* 1892, § 974.

   Nor do the facts above stated constitute an attempt to forge, under Code 1892, § 974, forbidding conviction of an attempt to commit a crime when it shall appear that the crime intended or the offense attempted was perpetrated, since the writing of the figure "1" between the "$" and the "2.50" was fully accomplished and no other effort or intent is shown or suggested.

FROM the circuit court of, second district, Coahoma county.
HON. SAMUEL C. COOK, Judge.

Wilson, the appellant, was indicted, tried, and convicted of an attempt to commit forgery, and appealed to the supreme

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court. The opinion of the court fully states the facts of the case.

J. A. Glover, for appellant.

Forgery is defined as "the false making or materially altering, with intention to defraud, any writing, which, if genuine, might apparently be of legal efficacy for the foundation of a legal liability. The essence of forgery consists in making an instrument appear to be that which it is not." Bouvier's Law Dictionary.

The rule of law as to the validity of an instrument is the same in criminal as in civil matters, and the same rules of construction prevail in ascertaining the legal import of the instrument charged to be forged in a prosecution for forgery as would prevail in a civil action on the instrument. *Bland* v. *People,* 4 Ill., 364.

The appellant here is not guilty of forgery, for several reasons. First—Because the alteration made in the draft of check was not material. In all banking institutions where there is a variation between the writing or figures in a check or draft, the writing prevails; and if a check be written out, having no marginal figures indicating the amount, it is acknowledged by the rule of the commercial law and of banks that it should be paid. Therefore the figures are immaterial. The supreme court of Louisiana decided a case almost identical in its facts with the present one, and decided it in the way in which we contend this case should be decided. *State* v. *Means,* 18 South. Rep., 514 (s.c., 47 La. Ann., 1535). See also *Bailey* v. *State,* 1 Mass., 602; *State* v. *Stevens,* 1 Mass., 202; *State* v. *Wilson,* 68 Mass., 70; *Cox* v. *State,* 66 Miss., 14; *Griffin* v. *Furry,* 30 Ill., 251; *Galloway* v. *People,* 17 Wend. (N. Y.), 540; *Rembert* v. *State* (Ala.), 25 Am. St. Rep., 639.

Can the defendant be convicted of an attempt to commit forgery? Bouvier, in his Law Dictionary, defines an attempt to commit a crime as "an endeavor to accomplish a crime carried

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beyond mere preparation, but falling short of the execution of the ultimate design of any part of it." And it is further said by the same author that to constitute an attempt there must be an intention to commit some act which would be indictable if committed. Bishop on Criminal Law says that to constitute the crime of an attempt the thing done would be the crime itself if carried to completion. Of course if what the appellant did was innocuous and he could not be convicted of forgery, he cannot be held liable for an attempt to forge, since he accomplished everything he intended to accomplish, and there was no proof of any other intention or purpose than that of writing the figure "1" between "$" and "2.50."

William Williams, attorney-general, for appellee.

Counsel for appellant seems to rely upon the proposition that the figures on the face of the check are immaterial, and since appellant did not change the writing in the face of the check, he is not guilty as charged. If appellant had been convicted of forgery, this proposition might be sustained, but as he was convicted of an attempt at forgery, we submit that the position of counsel for appellant is not tenable. Appellant certainly attempted to change the check so as to receive $12.50 instead of $2.50, for which the check was written.

It is true that there must be an attempt to commit a crime and an act toward its consummation before one can be punished under the laws of this state. Under the above statement of facts an act was done with the intent to defraud and cheat. Said act was done with a criminal intent, and is therefore a crime made punishable by law. This proposition was settled by this court in *Cunningham's Case*, 49 Miss., 685; 1 Bish. New Criminal Law, sec. 437.

Argued orally by *J. A. Glover*, for appellant, and by *William Williams*, attorney-general, for appellee.

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Opinion of the court.

CALHOON, J., delivered the opinion of the court.

Wilson was convicted of an attempt to commit forgery, the court below properly charging the jury that it could not convict of the crime itself. The instrument of which attempt to commit forgery is predicated is a draft for "two and 50-100 dollars," as written out in the body of it, having in the upper right-hand corner the figures "$2.50-100," as is customary in checks, drafts, and notes, and having plainly printed and stamped on the face of the instrument the words "Ten Dollars or Less." Wilson, with a pen, put the figure "1" before the figure "2" in the upper right-hand corner, making these immaterial figures appear "$12.50" instead of "$2.50," and undertook to negotiate it as $12.50. This was not forgery, because it was an immaterial part of the paper, and because it could not possibly have injured anybody. In order to constitute the crime, there must be not only the intent to commit it, but also an act of alteration done to a material part, so that injury might result. *Rembert* v. *State*, 53 Ala., 467 (25 Am. St. Rep., 639); *Roode* v. *State*, 5 Neb., 174 (25 Am. St. Rep., 475); 1 Bish. New Crim. Law, secs. 572–740; *Commonwealth* v. *Wilson*, 2 Gray, 70; *State* v. *Pierce*, 8 Iowa, 235; *People* v. *Galloway*, 17 Wend., 540; *Anderson* v. *State*, 20 Tex. App., 595; *State* v. *Smith*, 8 Yerg., 150; *Howell* v. *State*, 37 Tex., 591; *Barnum* v. *State*, 15 Ohio, 717 (45 Am. Dec., 601); *People* v. *Tomlinson*, 35 Cal., 503; *State* v. *Briggs*, 34 Vt., 501; *State* v. *Corley*, 63 Tenn., 410; *Cox* v. *State*, 66 Miss., 14 (5 South. Rep., 618); *State* v. *Means*, 47 La. Ann., 1535 (18 South. Rep., 514); *Commonwealth* v. *Bailey*, 1 Mass., 62 (2 Am. Dec., 3); *Commonwealth* v. *Stevens*, 1 Mass., 203. These authorities might be numerously added to, but it is enough to say now that they sustain what we have said, and establish also that an instrument void on its face is not the subject of forgery, and that, in order to be so subject, it must have been capable of working injury if it had been genuine, and that the marginal numbers

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and figures are not part of the instrument, and their alteration is not forgery.

This being true, can the conviction of an attempt to commit forgery be sustained in the case before us? We think not. No purpose appears to change anything on the paper except the figures in the margin, and this could not have done any hurt. Our statute (Code 1892, § 1106) confines the crime of forgery to instances where "any person may be affected, bound, or in any way injured in his person or property." This is not such a case, and sec. 974 forbids convicting of an attempt "when it shall appear that the crime intended or the offense attempted was perpetrated." In this record the innocuous prefix of the figure "1" on the margin was fully accomplished, and no other effort appears, and, if genuine, could have done no harm; and so the appellant is guiltless, in law, of the crime of which he was convicted.

Reversed and remanded.

ILLINOIS CENTRAL RAILROAD COMPANY v. THOMAS E. CLARKE.

MASTER AND SERVANT. *Trespass. Verdict against master. Acquittal of guilty servant.*

Where a master and his servant were jointly sued in trespass for the acts of the servant, a verdict, rightfully convicting the master, but wrongfully acquitting the servant, should not be set aside on motion of the master because of the acquittal of the servant.

FROM the circuit court of Grenada county.

HON. WILLIAM F. STEVENS, Judge.

Clarke, the appellee, was plaintiff in the court below, and the railroad company, the appellant, and one John Lewis, were

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defendants there. Lewis was a locomotive engineer of the railroad company, and the action was in trespass for damages inflicted on the plaintiff by the wrongful running of a train of cars against him and his vehicle while crossing the railroad track; the railroad company acted only through and by its codefendant Lewis as its servant and agent. The verdict was in plaintiff's favor and against the railroad company, but it acquitted defendant Lewis from all liability to the plaintiff. From a judgment based on said verdict the appellant railroad company appealed to the supreme court.

Mayes & Longstreet, and *J. M. Dickinson,* for appellant.

The verdict of the jury in fixing a liability on the railroad company and in excusing the engineer, Lewis, from recovery was an exoneration of the railroad company; and if it were not an exoneration of the railroad company, and if on the facts this court should hold that plaintiff had a right to recover, then the verdict of the jury, having been returned against the Illinois Central Railroad Company alone, was against the law and the evidence. In support of this proposition, we desire to say to the court, first, that if there was any liability on the railroad company in this case, it was a technical liability on the theory that liability could only be fastened on the railroad company through the medium of the alleged wrongful action of the engineer.

The right of the plaintiff against the railroad company was a derivative one, derived through the alleged wrongful action on the part of Lewis. There is no pretense anywhere in the record that the railroad company, or the principal, as such, was guilty of any wrong here. The whole cause of action is based on the alleged negligent, willful, and wanton acts of the engineer. So true is this, and so strongly did the plaintiff below endeavor to show that the engineer had acted without due regard to the rights of plaintiff, that he obtained from the court an instruc-

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Brief for appellant.

tion that punitive damages were warranted in the case if the acts of the engineer were willful, wanton, and reckless.

This was an action against both the company and the engineer, and if the engineer was without fault, there could be no recovery against the company, and yet the jury in their verdict excused the engineer and rendered a verdict against the company for the whole recovery.

In order to illustrate this proposition in its strength and entirety we desire to say to the court that this is preëminently a case where if any recovery could be had against the railroad company on the doctrine of *respondeat superior* the railroad company in this instance had it not been for the verdict of the jury could recover from the engineer any loss to which it may be subjected by reason of this suit and his wrongful conduct.

It is true that as a rule there is no contribution between tort feasors, but this rule has its exception, and that exception is exemplified in the case at bar and is one supported by the great weight of authority.

For instance, it has been asserted that "where the employer has been subjected to liability by the act of an employe he can recover indemnity from the guilty servant." *Smith* v. *Foram,* 43 Conn., 244 (s.c., 21 Am. St. Rep., 647); *Grand Trunk Railroad Co.* v. *Latham,* 63 Maine, 177; *Lowell* v. *Boston,* 34 Am. Dec., 33.

And especially is the rule stated in the recent cases of *Warax* v. *Railroad Co.,* 73 Fed. Rep., 637, 641; *Helm* v. *Railroad Co.,* 120 Fed. Rep., 389; *Brewing Co.* v. *Phybylski,* 82 Ill. App., 361, 367.

In all these cases it is held that the general doctrine that there is no contribution between tort feasor is not applicable where the wrong was wholly occasioned by the act of the employe without the actual knowledge and participation of the principal, and that where this condition is true the principal may recover over against the employe, and yet in this case, where it was not possible for any liability to be visited on the pricipal, the Illinois

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Central Railroad Company, except through the employe and his wrongful acts, in a suit against both the jury exonerates the employe and returns a verdict against the principal.

The question is one of original impression in this court, and is one not altogether covered precisely by precedent, that we have been able to find. But it is only because a finding of this sort, under a statute like ours, which warrants, in a suit against two defendants, a verdict against one and an exoneration of the other, has not been found elsewhere.

If the judgment in this case was *res adjudicata,* and of this we have some doubt, Lewis could plead his acquittal by the jury in bar of a suit by the company against him to recover for this loss imposed upon it by his alleged willful and wanton action.

Wm. C. McLean, for appellee.

Appellant's counsel ingeniously argues that this case ought to be reversed because the engineer was exonerated by the verdict of the jury, and that since the evidence shows that both engineer and railroad company were jointly and severally liable, therefore the verdict was wrong. It is evident from the amount of the verdict that the jury did not believe that there was any willful or intentional wrong upon the part of the engineer, and consequently the verdict in exonerating the engineer can be explained upon the idea that the jury thought that the engineer would not be liable unless he was guilty of willful or wanton injury. The authorities are very much divided upon the proposition as to whether the defendants were jointly or severally liable. The authorities cited by counsel in his brief do not at all bear out his contention. In *Helm* v. *Railroad Co.,* 120 Fed. Rep., 389, it was held that the action was not joint, but several, and that consequently a separable controversy arose so as to justify the removal of the cause to the federal court. In *B. B. Co.* v. *Loseneick,* 82 Ill. App., 361, it was specifically held that a joint action could not be sustained against master and servant when the master is liable only upon the doctrine of the *respondeat*

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superior. In *Warax* v. *Railroad Co.*, 72 Fed. Rep., 637, it is held that while the master is liable for the act of the servant solely for the relationship between them upon the doctrine of *respondeat superior,* and not by reason of any personal share upon the part of the master in the wrongful act, the master is liable severally, and not jointly, with the servant. The act of the servant in that case was misfeasance, and not nonfeasance, and consequently the cause was not joint and hence removable. In *Railroad Co.* v. *Latham*, 63 Maine, 180, was a case where the conductor treated wrongfully a lady passenger, and the court stated that "every servant is bound to take due care of his master's property intrusted to him." In *Smith* v. *Foram,* 43 Conn., 244, the goods were intrusted to the master for transportation. The servant injured them, and hence liable to the master, because the master has special interest in the goods. It will, therefore, be seen from the above authorities, which are the ones relied on by appellant, that where the servant is not guilty of misfeasance, as contradistinguished from nonfeasance, the action should not be joint, but several. If this is true, it then follows if the jury believe that the engineer was not guilty of a willful or wanton act, then the engineer was not liable to the plaintiff, and consequently the verdict exonerating the engineer was proper.

Under our statute different verdicts and judgments can be rendered against different defendants, and the fact that the judgments are not the same is not error. Code 1892, § 752. Sec. 4378, Code 1892, specifically says: "One of several appellants cannot be entitled to a judgment of reversal because of error in the judgment or decree against another not affecting his rights in the case." It is unnecessary to cite authorities to the proposition that one defendant cannot complain of errors committed against or in favor of his co-defendant. *Weis* v. *Aaron,* 75 Miss., 138, specifically holds that this statute is applicable to all cases where the judgment below is not absolutely void. 3 Cyc., 235.

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Plaintiff would have the right to complain of failure of the jury to give him a verdict against the engineer, but upon what grounds has the railroad company the right to complain that the jury failed to find a verdict against the engineer? In what shape, manner, or form does that affect the right of the railroad company? The judgment in this case, as between engineer and appellant, is not *res adjudicata,* because there was no issue between them, as to and between them the suit was a mere by-play. As between the plaintiff and the engineer, it is conclusive, but not so between the defendants. There was no suit in issue between them; as to and between them the suit was a mere byplay. allies. The rule is well settled that as between the engineer and the appellant the judgment in the lower court was not *res adjudicata.* 2 Black on Judgments (2d ed.), sec. 599; 24 Am. & Eng. Ency. Law, 731, 732.

A case on all fours with the case at bar is *Railway Co.* v. *James,* 73 Tex., 12. That was a suit brought against the railroad company and three of its officers. They were sued on a joint cause of action, and the gravamen of the suit was a malicious prosecution. The railroad company could only have been held liable because of the misfeasance or malice of its officers, and yet the verdict of the jury in that case exonerated the servants or officers, and found a judgment against the master, the railroad company. The point was specifically pressed, as here, that since the suit was a joint one, that since the servants were exonerated, it *ipso facto* operated as a release to the master. But the Texas court held that although apparently the verdict was inconsistent, it presented no grounds for a reversal. We submit that the only question before this court is this: Was the plaintiff injured by reason of negligent act of the defendant or any of its servants? If so, the judgment should be affirmed; if not, it should be reversed. In other words, the question is this: Are the plaintiffs to be denied their just rights because the jury failed to do its duty in failing to award a verdict against another party equally responsible?

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Argued orally by *J. C. Longstreet,* for appellant, and by *W. C. McLean,* for appellee.

TRULY, J., delivered the opinion of the court.

We cannot perceive that the appellant has any grounds of complaint on account of the failure of the jury to include in the verdict its co-defendant. Assuming that both the railroad company and its employe and co-defendant, the engineer in charge of the engine causing the damage, were equally liable; assuming, further, that they were jointly liable—the right of action which the appellee had was both joint and several, and each defendant was liable for the whole damage. Though equally liable, their liability was based on distinct and different legal principles—the engineer, because of his personal trespass; the railroad company, because of its failure to discharge its non-delegatable duty to the public regarding the custody and management of its dangerous instrumentalities. The appellee could have instituted suit for the entire amount of damage which he had suffered against either of the parties, or against both, as he chose to do. Had the verdict been against both, this would neither have lessened nor increased the liability of appellant for the entire judgment. Nor is the fact that the jury, no matter by what motive actuated, failed to find a verdict against appellant's co-defendant, in any wise prejudicial to the rights which may exist between appellant and its co-defendant, growing out of the subject-matter of this suit. Conceding the irregularity of the verdict, and that in fact appellee should have recovered against both, this concession conveys an implied acknowledgment of the rightfulness of the verdict against appellant, and justified the affirmance thereof, leaving appellant and appellee to settle the existing equities between them as they shall deem best. Because appellee by reason of the whim or sympathy of the jury, was denied a recovery against both who were liable, is no argument why he should be deprived of that which he did obtain. The question here involved, while new in the instance, is not novel in princi-

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ple. See *Knowles* v. *Summey,* 52 Miss., 377; *Weis* v. *Aaron,* 75 Miss., 138 (21 South. Rep., 763; 65 Am. St. Rep., 594); *Railway Co.* v. *James,* 73 Tex., 12 (10 S. W., 744; 15 Am. St. Rep., 743).

Affirmed.

RICHARD H. HALEY *v.* JOHN McC. MARTIN.

DEEDS. ***Description. Plats. Field notes. Grantee's rights.***

A deed to lands, describing the same as being certain designated lots of a survey shown by a plat recorded in the record of deeds of the county, conveys the land as shown by the plat, irrespective of "field notes."

FROM the chancery court of Claiborne county.

HON. WILLIAM P. S. VENTRESS, Chancellor.

Haley, the appellant, was the complainant, and Martin, the appellee, defendant in the court below. From a decree in defendant's favor, sustaining a demurrer to the bill of complaint, the complainant appealed to the supreme court. The facts are stated in the opinion of the court.

C. A. French, for appellant.

We must have some way to locate the land intended to be represented by the Irwin plat, and as there is no known way of locating land by a plat, except to run it out by the field notes by which the plat was made, we must necessarily have recourse to Irwin field notes; and the field notes are really a part of the plat, otherwise we could not locate the land, and the deed would fail for want of description of the land intended to be conveyed by the deed. We can hold all of the land included in the field notes, by which Irwin made his plat, as against Martin, but against no one else. 5 Lawson's Rights, Remedies and Practice,

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secs. 2285, 2286. Whether it lies on the east or west side of Clark's creek there must be some way to locate the land, otherwise the deed is a nullity. Am. & Eng. Ency. Law (2d ed.), 759, title, "Description." The plat controls the deed, and the field notes the plat. 4 Am. & Eng. Ency. Law (2d ed.), 777; *Ib.*, 793; *May* v. *Baskins,* 12 Smed. & M., 429.

H. C. Mounger, for appellee.

This is not a bill for reformation of a deed on the ground of mutual mistake between Stewart Bros. and Haley, Stewart Bros. & Co. not even being made parties. No allegation of mutual mistake is made, and no case of that kind is sought to be made.

There is no contractual relation between Martin and Haley. Martin made no conveyance to Haley.

The complainant rests the main part of his case on the closing part of the Stewart deed, in which, after expressly limiting the description to land lying east of Clark's creek, they say they intend to "convey all of our title to said lots as shown by said survey, but we do not warrant the title to any of said lands lying west of Clark's creek.

Now this survey shows all the land to lie east of Clark's creek. The last sentence contains no conveyance of land west of Clark's creek, and cannot be construed to be such. It rather, if anything, puts Haley on notice that he cannot claim any land west of the creek. The deed does not say any of the land lies west of the creek, but, on the contrary, refers to the plat which shows all to lie east of the creek.

The field notes of Irwin are not referred to in the deed to Haley or in the deed from Martin to Stewart Bros. & Co. Only the plat is referred to as recorded. This is what controls if there be any discrepancy between the notes and the plat.

Whether Irwin's plat is correct or not makes no difference. If not correct, then the deed of complainant is not correct. He cannot claim under the plat and then insist that it is not correct.

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Argued orally by *C. A. French,* for appellant, and by *H. C. Mounger,* for appellee.

CALHOON, J., delivered the opinion of the court.

Martin conveyed to the Stewarts a large body of land. A part of it consisted of lots described severally as "lots A, B, C, D, E, F, G, H, I, L, of the survey of Greenwood plantation by D. D. Irwin, a plat of which survey is of record in deed book 3 M, pp. 192, 193, of the records of deeds of Claiborne county, Mississippi, which plat is here referred to for a more full and particular description of the said lots." By the plat referred to it appears that Clark's creek is the western boundary of lots E and F, so conveyed. On this, if the controversy were between Martin and the Stewarts, we think that clearly the latter took only by the plat, and got only what was east of Clark's creek according to the lines of the plat. If this did not coincide with the design, the remedy of Stewart Bros. was a bill to reform the instrument to conform to the actual intention of the parties. But while this situation existed Stewart Bros. conveyed to appellant, Haley, with this description: "All that part of Greenwood plantation lying east of Clark's creek, . . . and consisting of lots B, C, D, E, F, G, H, I, G, and L of the D. D. Irwin survey of said place as shown by said plat of the same of record in deed book 3 M, pp. 192, 193, of the deed records of said county, which is here referred to. . . . It is intended hereby to convey all of our title or any part of any of said lots, as shown by said survey, but we do not warrant the title to any of said lands lying west of Clark's creek or north of Bayou Pierre." Forty acres are west of Clark's creek, and are retained by Martin, and claimed by Haley under his conveyance from the Stewarts, and this appeal is from a decree sustaining Martin's demurrer to Haley's bill, which sets up the facts we have given, and seeks the removal of Martin's claim to the forty acres west of the creek. The object of the bill is to have the court go behind Irwin's mapped plat and investigate his field notes, which

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field notes, it is claimed, properly extended, would have made the plat, if properly drawn, show the forty acres to be in fact east of the creek. The court below refused to allow this in this proceeding, and so do we. Martin's conveyance was by the recorded plat, not by the field notes. If they were incorrectly mapped, the conveyance was none the less by the plat, and this cannot be affected by any mistake in them. It is questionable if any man buying by a recorded map would bother about field notes. Without the plat Haley would have nothing. He is bound to claim under it, but wants to claim under it as incorrect, and to have the error corrected by the field notes. It is not possible that he can claim under the field notes, because the conveyance was not by them, but by the plat.

We do not now decide whether Haley got anything from the Stewarts west of the creek, on the insistence that in this case the actual conveyance is only land "lying east of Clark's creek" unaffected by the subsequent recital of the intention—in other words, that a conveyance must be a conveyance, and not a mere recital of intention. "Sufficient unto the day," etc.

Affirmed.

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Statement of the case.

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JOHN K. NUTT, ADMINISTRATOR, v. GERARD BRANDON, ADMINISTRATOR.

JOHN K. NUTT, ADMINISTRATOR, v. ELIZABETH A. FORSYTHE ET AL.

JOHN K. NUTT, ADMINISTRATOR, v. PATRICK HENRY, EXECUTOR.

THREE CASES.

ESTATE OF DECEDENTS. *Insolvency. Suits against. Statute of limitation.*

There was no statute of Mississippi after the code of 1857 became operative, November 1, 1857, and before the code of 1880 went into effect, November 1, 1880, prohibiting suits upon debts due from the insolvent estate of a decedent, although there was such a statute both before (Laws 1821, p. 72; Hutchinson's Code, p. 668) and afterwards (Code 1880, § 2062; Code 1892, § 1946); hence the statutes of limitation against such debts were not suspended during said period of time by the decree of insolvency. *Hendricks* v. *Pugh*, 57 Miss., 157, and *Pool* v. *Ellis*, 64 Miss., 555, explained.

FROM the chancery court of Adams county.

HON. WILLIAM P. S. VENTRESS, Chancellor.

The appellee, Brandon, administrator of a deceased heir; Mrs. Forsythe and others, heirs; and Henry, executor of a deceased heir of Haller Nutt, deceased, of whose estate the appellant, John K. Nutt, was the administrator, petitioned the chancery court to compel said administrator to make distribution of money in his hands. The only defense made by the administrator was predicated of the fact that debts of considerable amounts, aggregating $90,000, had been probated against the estate, which had not been paid. The petitioners contended, in answer to this defense, that all of said debts were long since barred by the statute of limitation, and this was the only ques-

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tion in the case, and this in turn was resolvable by the inquiry whether the running of the statute against the debts was suspended by the decree, rendered in 1867, adjudging the estate of the decedent insolvent. From a decree ordering distribution, the administrator, Nutt, appealed all of said cases to the supreme court.

Julia A. Nutt was appointed administratrix of the estate of her husband, Haller Nutt, in 1866; and, upon her petition, after notice had been given to the heirs and distributees of that estate, the estate was, at the June term, 1867, of the probate court, declared insolvent; and under that decree Julia A. Nutt, as administratrix, made a sale of all the land belonging to the estate, and reported the sale to the probate court, and the sale was confirmed, and a decree rendered requiring the administratrix to publish notice to creditors of the estate to come forward and prove their claims on or before the first day of November, 1868, or such claims would be barred, and publication was duly made; and there are no further proceedings in the administration of the estate, but claims against the estate of Haller Nutt were registered by creditors, amounting to about $90,000. John K. Nutt, present appellant, was subsequently appointed administrator d. b. n. c. t. a. of the estate of Haller Nutt, deceased, and in 1902 received, as such administrator, $60,000, the proceeds of a claim against the United States government.

[For a previous report of these cases, see *Nutt* v. *Forsythe et al.*, 84 Miss., 211, and for reports of cases growing out of the affairs of the same estate, see *Knut* v. *Nutt*, 83 Miss., 365, and *Nutt* v. *Knut*, 84 Miss., 465.]

Percy & Campbell, for appellant.

Owing to the confusion and uncertainty in the statutes and decisions in regard to the effect of insolvency proceedings in arresting the statute of limitation, the administrator is apprehensive lest a distribution of the estate to the distributees will be followed by an attempt on the part of creditors to make him

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respond to their stale demands, and it is this apprehension which has impelled him to prosecute this appeal. He asks that the court pass upon the rights of creditors as fully as if such rights were being presented by these creditors who have lain dormant.

J. A. P. Campbell, for the appellees, argued the case orally, and a synopsis of his argument is here given:

Prior to the code of 1857 the statutes prohibited suits against the personal representative of an estate after decree of insolvency. By code of 1857 the prohibition to sue was repealed, and creditors were left free to sue, but according to *Whiting* v. *Parker,* 6 How. (Miss.), 352, 359, no execution was allowable. The law thus remained until the code of 1880. The administration of Nutt's estate was begun in 1866, and it was declared insolvent in 1867. There being no hindrance to creditors to sue, the statutes of limitation were operative, and every claim was long since barred. Our longest time for any sort of claim is ten years, and here nearly forty have expired. The argument is a demonstration, and there could be no difference of opinion about it but for an inadvertent and unfortunate, because untrue, declaration of this court in *Hendricks* v. *Pugh,* 57 Miss., 157, blindly followed in *Pool* v. *Ellis,* 64 Miss., 555. Both are clearly wrong, and this court is called on to correct the error. *Hendricks* v. *Pugh* really rests on estoppel because of peculiar circumstances, and in *Pool* v. *Ellis* the question was unimportant, as shown by the opinion. At all events, they are both wrong in this feature, and should be so declared to vindicate the law. The appellant is ready to distribute, if this court will declare, as it is earnestly asked by all parties to do, that the statutes of limitation were uninterrupted by the decree of insolvency.

Reed & Brandon, for appellees, Brandon, administrator, and Mary A. and Elizabeth Forsythe; and *Henry & Scudder,* for appellee, Henry, executor.

The briefs of counsel for appellees presented the same points

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as those made by Judge Campbell in his oral argument, a synopsis of which is given above.

CALHOON, J., delivered the opinion of the court.

If there was in the creditors the right and power to sue, not exercised for seven, or certainly for ten, years, it is clear they are barred. By ch. 30, p. 72, Laws 1821, sec. 103 (Hutchinson's Code, p. 668), actions against executors and administrators of insolvent estates, after declaration of insolvency, are expressly forbidden, except for debts for expenses of the last sickness and funeral. By Laws 1822, p. 85, sec. 1 (Hutchinson's Code, p. 673, art. 2), the law was so changed as to permit suits pending at the date of the representation of insolvency to the court to proceed to trial and judgment. But by *Parker* v. *Whiting's Adm'r,* 6 How. (Miss.), 352, 359, it was held that, even then, execution could not be issued, because the court said the spirit of the law forbade plaintiff from making his judgment effectual over other claims, and the judgment was in such case merely the judicial ascertainment of the correctness of the claim to be registered, as others, for equal distribution. The law stood in this condition for thirty-five years, and until the code of 1857. This code, or any law up to 1880, has no clause forbidding suits or actions against the representatives of insolvent estates, and in the record before us the estate was declared insolvent in 1867, under the code of 1857. The omission in this code of 1857 to forbid suits was not considered in *Hendricks* v. *Pugh,* 57 Miss., 162, 163, and this led to the erroneous paragraph on top of page 163. The case was decided really on the idea that in that case the heir was estopped, for reasons given, from setting up the statute of limitations. This error was inadvertently followed in *Pool* v. *Ellis,* 64 Miss., 555 (1 South. Rep., 725), when, also, it was unnecessary to the decision of the case. We cannot follow these unnecessary expressions, and so we hold the claims long since barred, and that appellant may make distribution.

Affirmed.

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JAMES W. MILLER v. HORACE G. BULKLEY.

1. **RES ADJUDICATA.** *Sale of chattel. Suit for price. Breach of warranty.* **Where the seller sued for the price of a chattel and the buyer pleaded a breach of warranty in defense, a judgment in plaintiff's favor will bar any subsequent action by the buyer for a breach of the warranty.**

2. **SAME.** *Replication to plea of. How plea tried.* **A replication to a plea of *res adjudicata* alleging that the issues tried in the prior action were not those involved in the pending suit presents no issue of fact for a jury, since the plea must be tried upon the record presented.**

FROM the circuit court of Adams county.

HON. MOYSE H. WILKINSON, Judge.

Miller, the appellant, was plaintiff in the court below; Bulkley, the appellee, was defendant there. From a judgment in defendant's favor the plaintiff appealed to the supreme court.

In August, 1902, plaintiff ordered an automobile from defendant, the price of which was $425, of which $100 was paid. After some correspondence between the parties—Miller wanting to test the machine in a certain way before paying for it, and Bulkley declining to allow the test made as requested—Miller, claiming that he had declined to accept the machine, brought suit in a justice of the peace's court against Bulkley to recover the $100 paid, where he recovered, and Bulkley appealed to the circuit court. Bulkley also brought suit against Miller to recover $325, the balance of the purchase money. Both cases were by consent tried together, and resulted in a verdict and judgment for Bulkley for the balance of the purchase money demanded. After the judgment in the other cases, Miller brought this suit against Bulkley to recover the money paid for the automobile, alleging a breach of warranty. Bulkley filed, among other pleas, a plea of *res adjudicata.* To this plea plaintiff filed a replication as follows: "And the said plaintiff, to the said plea

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of the said defendant by him thirdly pleaded, saith *precludi non*, etc., because the said plaintiff saith that the said several promises and undertakings in the plaintiff's said declaration mentioned were not, nor was any or either of them, any of or any one of them, the same identical promises or undertakings as those, or any of those, in the said third plea mentioned, and for and in respect whereof the said supposed judgment in the said plea mentioned was recovered, in manner and form as the said defendant hath above in his said plea alleged. And this the said plaintiff prays may be inquired of by the country." Defendant demurred to this replication, and the court sustained the demurrer, and plaintiff then filed another replication. The issue thus joined on the plea was tried by the court, resulting in the plea of *res adjudicata* being sustained.

K. P. Lanneau, and *Reed & Brandon*, for appellant.

The circuit court erred in rendering the order sustaining the defendant's demurrer to the plaintiff's replication to the defendant's third plea to the declaration, being a plea of *res adjudicata*.

That a judgment is of record in the former suit between Miller and Bulkley, and that said judgment is in favor of Bulkley, is not denied or attempted to be denied by Miller; but by his replication, which is demurred to, Miller intends to deny, and does deny, that a judgment for "the same cause of action" has ever been rendered against him. By this replication a question of fact for the jury is raised. The right to present evidence and testimony before the jury in support of the same is claimed.

In 3 Chitty on Pleadings (ed. 1851), in the chapter on Replications in Assumpsit, sec. 1158, we find the following form, authority, and precedent:

(*Precludi non*, as ante, 1145.) "Because he saith that the said several promises and undertakings in the said declaration mentioned were not, nor was any or either of them, any of or any one of the same identical promises and undertakings as those or any of those in said plea mentioned, and for and in

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respect whereof the said supposed judgment in the said plea mentioned was recovered, in manner and form as the said defendant hath above in his said plea alleged. And this the said plaintiff prays may be inquired of by the country," etc.

We now ask that this court will compare our replication with the foregoing form, and it will appear that the form has been strictly followed. We know of no higher authority upon the correct form of pleadings than Chitty, and are not aware that any later or better authority exists to support the claim that the above form is incorrect. The defendant says plaintiff does not by said replication deny that the supposed judgment was rendered in and for the same cause of action. We repeat that we do deny it, and Chitty said that the form used is the proper form of replication to a plea of judgment recovered denying that it was for the same cause of action. The plaintiff knew what he wished to deny, and selected for said purpose an approved form. It was for him, and not for the defendant, to say what he wished to deny; and we submit that the circuit court gravely erred in sustaining the demurrer and restricting the plaintiff to a replication in a different manner and form, when viewed from the standpoint of facts which the plaintiff denies and of facts he offers in his replication to prove, when he prays that the matter may be inquired of by the country.

By sustaining said demurrer to plaintiff's replication the court deprived the plaintiff of his right to introduce parol testimony in support of the fact that the cause of action in this suit is not the same as in the former suit. There is abundant authority to the effect that under this replication such testimony is proper and admissible. In fact, in this case it was really necessary for the enlightenment of the court. We ask the court to read the notes and authorities cited in 21 Am. & Eng. Ency. Law (1st ed.), 191, 192. We quote partially, "Parol evidence is admissible to show what was settled in the former suit," referring to evidence of what was adjudicated under the plea of *res adjudicata.*

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In the former litigation the cause of action from Miller's point of view was his right to rescind an executory contract of purchase of a certain automobile ordered of Bulkley, on account of the latter's refusal and failure to submit the machine to a required test before delivery and payment, and his further right upon such rescission to recover back from Bulkley $100 advanced on the purchase price; and, conversely, the cause of action from Bulkley's point of view was his right to deliver the automobile and collect the balance of $325 of purchase price without submitting the machine to the test required by Miller.

The judgment simply amounts to an adjudication to the extent and effect that Miller must accept the automobile and pay the balance of $325 of purchase price, without the test he demanded having first been made, and that it was not incumbent on or the duty of Bulkley to allow Miller to make said test or to part with possession of the machine until said balance of purchase price was paid. The machine then, pursuant to the effects of said judgment, was delivered to Miller and was by him paid for, without having been first subjected to the test required by Miller—viz., of being run over the streets of the city of Natchez for a couple of days by his employe to demonstrate its capacity, suitableness, etc., for the purposes of a delivery wagon.

The cause of action in the present suit on appeal is based upon the alleged facts that, after having received and paid for said machine pursuant to said judgment against him, and without its having first been subjected to the test required, he, the said Miller, subsequently and on more than one occasion subjected said machine to a reasonable and proper test, and found that it was not adapted to nor reasonably suitable, fit, or proper for use in the delivery of groceries, etc., and not of sufficient power to propel itself and the deliveryman and load of groceries through the streets of the city of Natchez, etc.; that the said Bulkley, as a part of his contract, undertook and promised and warranted that said machine would be suitable, fit, proper, and adapted for the purposes aforesaid, and that the

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order was given on that understanding; that a breach of warranty had occurred, and thereupon, and as a cause of action, the present suit was instituted to recover for breach of warranty.

It must be manifest to this court that from the very nature of things the cause of action in the former proceedings is different from that in the present suit. The cause of action upon a breach of warranty had not arisen at the date of the trial of the former suits; it could not have arisen until the machine was delivered and subjected to a trial and test, and found not adapted, fit, suitable, and not of sufficient power to propel itself and load of groceries.

E. H. Ratcliff, and *C. Pintard,* for appellee.

The plea of *res adjudicata* was based on the record and prays that it be tried by the record. The first replication does not admit or deny the judgment, but avers that the said several promises and undertakings in the said declaration mentioned were not, nor was any or either of them, any other or any one of the said identical promises or undertakings as those or any of those in the said third plea mentioned, etc., and concludes to the country, which, if correct, would entitle the plaintiff to a trial by jury. This replication was demurred to under the authority of *Agnew* v. *McElroy,* 10 Smed. & M., 552. In this case the court held that in an action of assumpsit, where the question was between the same parties and same cause of action in an action of trover, the matter was *res adjudicata,* and this decision was rendered when the common-law pleadings were strictly adhered to and before the different common-law actions were virtually abolished. The court, in the case of *Agnew* v. *McElroy,* says: "It is not at this day to be doubted but that a judgment between the same parties for the same cause of action is conclusive between them. The principal consideration is whether it be principally the same cause of action in both appearing by the proper averments in a plea or by proper facts

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stated in a special verdict in a special case. It is immaterial that the form of the action is different if the cause be the same. The party is not precluded from showing that the latter suit is for another and different cause, if the fact be the same. By pleading the former judgment specially, the plaintiff is driven to take issue on a single point and admit or deny the judgment or deny that it was for the same cause of action." 3 Chitty on Pleading, note 929, also 1159, cited in *Agnew* v. *McElroy, supra.* Tried by this standard, the replication in this instance was bad. It does not admit the judgment and deny that the cause of action was the same, but it denies that the merits of the present suit were tried and determined in the former. This does not come up to the point, because the true question is whether the merits of the second suit were involved and might have been tried in the former action.

By reference thereto it will be seen that the notice of special matter to be offered in evidence upon the general issue, which was filed by Miller in the former suit, contains the same identical matter as the declaration in the instant case and raises the same issue. The notice of special matter contains the following: "That in the written correspondence between the parties, and also by reason of the nature of the contract for the construction of a wagon suitable for defendant's purposes, plaintiff agreed to submit the machine to any test that defendant might desire." The declaration in this case contains almost the identical language.

Here we have the same cause of action, viz.—the alleged failure of Bulkley to submit the machine to a reasonable test. This issue, as shown by the pleading, could have been tried, and the letters introduced by Miller show that it was tried, by the jury in the former suit, and Miller is now estopped from trying the issue a second time. It is shown beyond controversy, by Bulkley's letter to Miller of February 6, 1903, that a test of the machine had been made by a representative of Miller's, and that Miller himself had seen it operated.

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"The true test is whether the same cause of action was litigated and adjudged in the former suits. The form of the action may be different, but the grievance and wrong complained of must be the same in both suits." *Perry* v. *Lewis,* 49 Miss., 443; *Agnew* v. *McElroy,* 10 Smed. & M., 552.

The test in this class of cases is whether the evidence which would support the one case would sustain the other. *Green* v. *Bank,* 73 Miss., 542; Bigelow on Estoppel, sec. 79.

There is no case in this state that in the least, even by implication, changes this law. The case of *Green* v. *Bank, supra,* is the latest decision on this question in this state, and it sustains all previous decisions.

TRULY, J., delivered the opinion of the court.

The judgment of the court in sustaining the plea of *res judicata,* as presented by the record, was manifestly correct. The identical question arising upon the same contract had already been adjudicated in another suit between the same parties, in the same tribunal, at a previous term; and the judgment in the former suit, which was adverse to the appellant, had been satisfied and paid. Every element necessary to constitute a prior adjudication exists in this record. This is conclusive against the appellant. The contention of appellant that an issue of fact necessitating a submission to the jury was raised by his replication to the plea of *res adjudicata* filed by the appellee is untenable, and does violence to well-established rules of pleading. The plea of *res adjudicata* must be tried by, and decided solely upon, the record as presented.

Affirmed.

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SIMPSON COUNTY v. THOMAS J. BUCKLEY ET AL.

1. COUNTY SEAT. *Removal. Injunction. Compromise decree. Res adjudicata.*

   A decree dismissing a suit to restrain the removal of a county seat, resulting from a compromise, is not a bar to a similar suit by other persons not parties nor privies to, nor consulted in, the previous suit.

2. SAME. *Board of supervisors. Judgment of. Collateral attack. Constitution* 1890, *sec.* 259.

   An order of the board of supervisors declaring the proposition for a removal of the county seat carried, from which no appeal was taken, may be collaterally attacked in a suit to restrain execution of the order, where the record of the board shows that its action was in excess of its jurisdiction because the proposition was not carried by a two-thirds vote of all the qualified electors in the county, as required by Constitution 1890, sec. 259, when the place to which the county seat is to be removed is a greater distance from the geographical center of the county than the place where it was already located.

3. SAME. *Evidence. Number of voters.*

   Evidence is admissible to show the number of names remaining on the registration books of the county, after all proper erasures, on a contest as to whether the removal of a county seat was carried at an election on the subject by the requisite majority of all the qualified voters of the county.

4. SAME. *Simpson county election. Laws* 1900, *ch.* 149, *p.* 201.

   The county seat of Simpson county was not removed from Westville to Edna, now Mendenhall, by the election held under Laws 1900, ch. 149, p. 201, involved in this suit.

FROM the chancery court of Simpson county.

HON. ROBERT B. MAYES, Chancellor.

Buckley and others, the appellees, were complainants in the court below; Simpson county and the members of the board of supervisors thereof were defendants there. From a decree in

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complainants' favor defendants appealed to the supreme court. The facts are stated in the opinion of the court.

[For a prior report of the case, see *Simpson County* v. *Buckley,* 81 Miss., 474.]

C. M. Whitworth, Alexander & Alexander, and *George B. Power,* for appellant.

What is the jurisdictional fact in this case? The jurisdictional fact is that which gives authority to a tribunal to adjudge as between the parties. The right to proceed in the determination must not be confused with the correctness of the judgment rendered. *United States* v. *Arredondo,* 6 Pet., 709; *Rhode Island* v. *Massachusetts,* 12 Pet., 718; 17 Am. & Eng. Ency. Law, 1041, 1056, sec. 19.

The presence of authority to proceed in the particular case is jurisdiction. Elliott on Appellate Procedure, secs. 12, 499. *Turner* v. *Conkey,* 17 L. R. A., 509.

The jurisdictional fact in this case is the petition by two hundred electors. That gave the board power to sit as a special tribunal. That started the machinery of the special court. It is almost universal that the jurisdictional fact is something that the court, or tribunal, has to pass on initially. It is the almost universal rule that county boards or commissioners obtain their jurisdiction to hear and determine as to removal of county seats by a petition of the taxpayers or voters. 11 Cyc., 373.

If we are correct in this view, then the order is not subject to collateral attack, except for fraud, and this we understand to be the decision in *Hinton* v. *Perry County,* 84 Miss., 536, and in the former appeal in this case.

If it be held that the jurisdictional question is whether Edna (now Mendenhall) was nearer the center or that removal carried by a two-thirds majority of the qualified electors, we still say that that is sufficiently found in the order. It recites that "it appears to the satisfaction of the board that removal carried by receiving a majority of the votes cast," etc.

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Now the rule is that in doubtful cases courts treat defects as errors instead of jurisdictional defects. 17 Am. & Eng. Ency. Law, 1066. And mere looseness and informality in orders of inferior courts will never be held fatal. Great liberality must govern. B. &. A. Dig., 671; Works on Courts, 88, 89, 145.

The finding that removal carried is necessarily a finding that it received the requisite vote. To so construe the word "carried" is not to indulge a presumption in favor of the order. It is to construe a word and determine what its use indicated. It is the word used in the statute.

It is not sufficient for complainants to show that the order is void. They must show that the election did not carry for removal. In any election the vote is the material thing. *Pradat* v. *Ramsey,* 47 Miss., 24. It was not even essential that the board make any order. The removal follows "if it appears that the removal has carried." The finding of the board is in the exact language of the statute.

Chancery treats as done what ought to have been done. It is under this rule that equity will not relieve against a void judgment unless complainant shows merits—*i. e.,* that he does not owe the debt, or that on a second trial a different judgment would result. *Stewart* v. *Brooks,* 62 Miss., 492; *Newman* v. *Taylor,* 69 Miss., 670. And the justice and validity of his cause must be shown to a high degree of certainty. *Cotton* v. *Hiller,* 52 Miss., 7; *Greene* v. *Bank,* 73 Miss., 542.

Complainants recognize this rule and averred in the bill that Edna was further from the center and that it did not carry by two-thirds majority. These averments are denied by the answer, and complainants endeavored to prove them, but failed. They failed to show by any competent evidence the center of the county.

There was not sufficient proof as to the true number of voters in the county. The answer denied that Edna did not get two-thirds of all the votes in the county. The only proof at all was the registration book. The insufficiency of this has been more

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than once announced by this court. *Madison County* v. *Brown,* 67 Miss., 694; *Bew* v. *State,* 71 Miss., 1. As complainants' counsel relied on the case of *Hawkins* v. *Carroll County,* 50 Miss., 755, on this point, we suppose they overlooked the fact that Code 1871, § 373, made registration *prima facie* evidence of the right to vote.

Since the order has been executed and removal accomplished, the county seat and records cannot be moved to another place without a showing that the removal was fraudulently accomplished. The board can only canvass the result and direct the removal; but if the removal in fact carried, the absence of an order or an irregular order could not defeat the will of the people manifested at the polls. If the removal was accomplished by fraud (this involving, of course, illegality), the mandatory injunction to relieve against the fraud would lie; but in the absence of fraud the question is not whether the order is void, but, Did removal carry? The court finds a county seat at Edna and is asked to remove it to Westville, because the election did not carry. Surely, in the absence of fraud and of affirmative evidence that removal did not carry, the removal back will not be decreed. This is why the opinion in the Perry county case distinguished this case on the sole ground that fraud was charged.

It is argued that the decree in the Weathersby suit is not *res adjudicata,* because procured by collusion. The board was not a party to, or even cognizant of, the compromise. The class of litigants selected attorneys, and they brought the suit in the name of Weathersby. They selected Weathersby as their representative. Why should they not be bound by his acts and omissions? They sued out an injunction which bound the board of supervisors. A decree for complainant would have finally concluded the county. The estoppel should be mutual.

The general doctrine of the conclusive effect of decrees in class suits is discussed in Freeman on Judgments, sec. 178. See also Works on Courts and Jurisdiction, 144. If it is true

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that a judgment is conclusive, although resulting from ignorance or stupidity of counsel or the blunders of litigants, a decree ought to be conclusive when litigants, either from indifference or for a consideration, decline to press a suit and allow a court to render the proper judgment consequent upon their neglect.

If this decree is not binding, what is there to hinder one taxpayer from filing a suit and enjoining, and after a year or two, just before a final hearing, dismissing, and then repeat the same process, and so on, *ad infinitum?* This reasoning is strongly set out in 45 Cal., 6.

The law favors compromises, and compromise decrees bind parties and their privies; and as there is no evidence that the suit was collusive or the compromise fraudulent, the decree ought to be held binding.

Surely it cannot be argued that the statute means that no second election can be had unless two-thirds of the electors vote for removal. To so hold would be to defeat the right of a contesting place, although nearer the center, to be chosen on a second election by a mere majority. The most that complainants can, on their own theory, say is, in the language of the act, that "it appears that removal has carried, but no point has secured the number of votes necessary to a choice as required by sec. 259 of the constitution." In that case the only proper order should be that the second election should be held to see if Edna can secure the requisite vote.

Similar statutes and constitutional provisions have been construed by courts of other states. Our opinion is fully sustained by the opinion of Mr. Justice Brewer in the case of *County Seat of Osage County,* 16 Kan., 296.

J. A. P. Campbell, on the same side.

Many more than the two hundred qualified electors of the county required by the statute petitioned the board of supervisors to order an election on the question "of the removal of

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the seat of justice of said county from Westville to some convenient point on the Gulf & Ship Island Railroad." The order was made accordingly, and the election was held, at which nine hundred and four votes were cast, and six hundred and forty-four of them (more than two-thirds) were for removal, and six hundred and twenty-five were for removal to Edna (now Mendenhall), a point on the railroad mentioned. Although opportunity was given by the board for all other points to compete, no other did. In this state of case the board ordered removal to Edna, and it was effected. Any citizen might have been heard by the board in opposition and might have appealed from its action to the circuit court and to this court. No such course was taken. Buildings for county purposes were procured at Edna, offices were opened there, courts were held, taxes were levied and collected, tax sales were made, instruments were recorded, marriage licenses were issued; in fact, all public business was done, and bonds to the amount of $25,000 were issued and sold to raise money to pay for courthouse and jail. This suit was brought and a decree was made to undo all, and a return of the records to Westville within a short time was commanded. The decree is sought to be maintained on the ground that Edna is not toward the center of the county, and that two-thirds of the electors of the county did not vote for removal to that point. There is in the record some evidence which, if competent, tends to show that Edna is not toward the center of the county, but there is none to show how many electors were in the county. How can the court say that six hundred and twenty-five voters were not two-thirds of the electors of the county? The record of the board does not affirmatively show what proportion of the electors of the county the six hundred and twenty-five who voted for removal to Edna represented, but it does show that more than two-thirds of the nine hundred and four votes cast were for removal to Edna, and on this it ordered the removal. To make this order it must have appeared to the board that the six hun-

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dred and twenty-five who voted for removal to Edna were two-thirds of the electors of the county or that Edna is toward the center. What evidence the board had before it is not shown. It was not necessary for the record to contain the evidence. All that was required was that it should appear that the requisite number of votes had been given. The board was to be satisfied. The matter was committed to it. Had there been a contestant before the board, the evidence might have been made of record by bill of exceptions and preserved for the courts to pass on.

The petition of the requisite number of qualified electors of the county for the election invested the board with full jurisdiction of the matter of removal and devolved on it the duty to decide all questions in the further progress of the movement. It must be presumed in favor of its action that it had before it the evidence which warranted the order it made. This rule applies to courts of special and limited jurisdiction as well as to other courts. No presumption is indulged in favor of their jurisdiction over the matter; but, that appearing, the same presumptions apply to them as to other courts. *Cason* v. *Cason,* 31 Miss., 578, repeatedly cited and approved; *Monk* v. *Horne,* 38 Miss., 100, 103; *Cannon* v. *Cooper,* 39 Miss., 784, 789; *Pollock* v. *Buie,* 43 Miss., 140, 151; *McWilliams* v. *Norfleet,* 60 Miss., 988, 995.

If Edna is toward the center of the county, or if the six hundred and twenty-five voters for removal to Edna constituted two-thirds of the electors of the county, the removal was valid. The commissioners of election reported to the board that nine hundred and four votes were cast, and that six hundred and forty-four were for removal, and six hundred and twenty-five for removal to Edna. The board must have been satisfied, either that Edna is toward the center or that the six hundred and twenty-five voters were two-thirds of the electors of the county. In no other state of case could it have lawfully made the order for removal. Every intendment should be made in favor of the action of this tribunal composed of five freeholders repre-

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senting the five districts into which the county is divided, provided for by the constitution, intrusted with most important functions affecting the public welfare, and to which the law committed this matter of ascertaining and effecting the will of the electors of the county. Certainly, every admissible intendment should be made to avoid the disaster of a disturbance of the action of the board. It would be far better to commit the final decision of the matter to the board, unless fraud in its action was shown, than to tolerate interminable controversy in the courts over the whereabouts of the county seat.

If wrong in all of the foregoing, still the decree is erroneous and should be reversed. Removal of the seat of justice was carried by a majority of electors participating in the election. Six hundred and forty-six electors of the county voted for removal from Westville, and according to sec. 259 of the constitution that authorized removal, and if Edna be not toward the center and two-thirds of the electors of the county did not vote for removal to that point, still removal from Westville was carried by six hundred and forty-six voters of nine hundred and four who voted, and it was the duty of the board, if it did not appear that any point had received the number of votes prescribed by the constitution, to order another election to determine to what point removal should be made. If Edna is toward the center or two-thirds of the electors of the county voted for it, the failure of the order of removal to so state did not deprive the valid election of its legal effect; but if it did, it did not annul the majority vote for removal from Westville. That was certainly determined by the election.

In this view of the case the order of removal to Edna was merely premature, and a new election as to place should have been ordered; and as it was not, it should now be made. In this point of view the decree should be reversed and the cause remanded. It should have been a decree *nisi*—*i. e.,* unless in a reasonable time the board of supervisors should order an election to determine whether Edna shall be the seat of justice.

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The statute contemplated that there might be only one place voted on for the seat of justice. Its language is "point or points competing for the location." The board gave opportunity for all to compete. Edna alone did, and it would seem to be proper to limit the new election to the question of removal to Edna, but certainly to some competing point, if any, on the Gulf & Ship Island Railroad, as it then was being constructed through the county.

R. N. Miller, and *Watkins & Easterling,* for appellees.

The order of the board is as follows: "The board having carefully considered the report of the election commissioners rendering a tabular statement of the vote cast for 'removal,' 'no removal,' and the town of Edna, at the recent election, held on the 26th day of May, 1901, in accordance with a previous order of the board, and it appearing to the satisfaction of the board that 'removal' carried by receiving a majority of votes cast at said election, it is therefore moved and ordered by the board that the seat of justice of Simpson county be moved to the town of Edna."

The board of supervisors of Simpson county, particularly in passing upon the question of "removal" of the seat of justice, and alone authorized to act in the matter at all by the act of 1900, was a court of "special and limited jurisdiction." Brown on Jurisdiction, secs. 19, 20b; *Root* v. *McFerrin,* 37 Miss., 17; *Ballard* v. *Davis,* 31 Miss., 525.

Being a court of special and limited jurisdiction, the jurisdictional facts—that is, those facts necessary to give it power to act—must affirmatively appear on the record of such court. No presumptions can be indulged in favor of its jurisdiction. Unless these jurisdictional facts appear of record, its judgment is absolutely void. *Root* v. *McFerrin,* 37 Miss., 17; *Ballard* v. *Davis,* 31 Miss., 525; *Hawkins* v. *Carroll County,* 50 Miss., 755; *Woodruff* v. *Okolona,* 57 Miss., 806; *Bolivar County* v. *Coleman,* 71 Miss., 832; *Byrd* v. *State,* 1 How. (Miss.), 163;

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Marks v. *McElroy,* 67 Miss., 545; *Dyson* v. *State,* 26 Miss., 362; Lawson on Presumptive Evidence, 30, rule 9; 4 Rose's Notes of U. S. Reports, 331, and authorities cited.

All the cases on liquor elections in this state are to the same effect. The jurisdictional fact, which the board must have determined before it could remove the seat of justice on a majority vote, was that the removal "was toward the center of the county."

This it failed to do or even consider. The record shows that the question of whether the removal was toward or from the center was never presented or considered by the board. Its order of removal was therefore absolutely void, if the constitution of Mississippi is of force in Simpson county.

The only other question presented is as to the effect of the consent decree of the chancellor in the case of *Weathersby* v. *Board of Supervisors.* Prior to the institution of this suit one Weathersby filed a bill attacking the order of removal; and the record discloses, without any effort at contradiction, that Weathersby died, and his widow, being assisted in the matter and advised by several gentlemen (none of whom are parties to this suit), undertook to prosecute the suit until it was ready for trial, when she and her attorney were bought off; and for money paid them and land conveyed to them she and her attorney sold out.

The decree in the Weathersby case was not only a consent decree, but a decree purchased outright by those interested in removal, and the board of supervisors knew this to be the case. This record shows that the members of the board were all "removalists" except one, who voted "No" on every proposition except the final order of removal, and that this change of heart was the result of deliberately buying his sympathy by the same crowd. This the member frankly confesses. In truth, no uglier picture ever appeared of rank desertion of trust by chosen guardians of the people's rights than appears in this record. They bought out Mrs. Weathersby, got a decree, and hurried

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the records of the county off in the night and hauled them into Mendenhall between dark and daylight. They rushed off from a good brick courthouse and jail with the public records in the night time for fear some other citizen would interfere to prevent this patent violation of the law and the constitution. Under these circumstances, what effect as estoppel or *res adjudicata* has the decree, purchased as it was?

We assail the decree on the ground that it was first not rendered in a representative suit, a suit filed by Weathersby alone, and not in behalf of others as shown by the bill; and, second, if it was a representative suit, it was not conducted to a conclusion in good faith. It is not a decree which speaks the action of the court, it is not the judgment of the court, but is a purchased agreement.

Argued orally by *J. A. P. Campbell,* for appellant, and by *R. N. Miller,* for appellees.

TRULY, J., delivered the opinion of the court.

On a former appeal of this case—81 Miss., 474 (33 South. Rep., 650)—it was held that the complainants, appellees here, had such an interest in the attempted removal of the county site as permitted them to invoke the power of equity to restrain an illegal removal. The averments of the bill of complaint were held sufficient to withstand demurrer. Answer was required, and the cause was remanded, that it might be heard and determined on the merits. Upon final hearing, after proof taken, the chancellor decreed that the attempted removal of the county seat from Westville to Edna (now called Mendenhall) was illegal; that the orders of the board of supervisors directing such removal were null and void. The injunction against the removal was perpetuated, and the board of supervisors and those county officers who were joined as defendants were ordered to return all official records of the county to Westville, from whence they had been removed in pursuance of said void orders. From that decree this appeal is prosecuted.

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Opinion of the court.

A succinct statement of the facts material and necessary to a proper understanding of the questions here presented for decision is as follows: In 1900 the legislature of the state passed an act (ch. 149, p. 201) authorizing the board of supervisors of Simpson county, "upon the presentation before them of a petition signed by two hundred qualified electors of said county, to order an election submitting to the legal voters the question of the removal of the seat of justice of said county from Westville to some convenient point on the Gulf & Ship Island Railroad;" and after providing the form of the ballot to be used, so that an elector could on the same ballot vote for or against removal and also signify his preference for any point competing for the location of the seat of justice, the act proceeds: "If, after the votes cast in said election have been canvassed by the board of election commissioners, it appears that removal has carried, but no point has secured the number of votes necessary to a choice, as required by sec. 259 of the constitution of the state of Mississippi, then the board of supervisors of said county shall order another election, and give ten days' notice of the same, for the purpose of determining as to the point of location only, and the two points which received the highest number of votes at the first election shall be submitted to be voted upon, and the board of supervisors of said county shall continue to order elections until some point has secured the majority required by the constitution of this state; the point securing such majority shall be declared the permanent seat of justice of said county." The petition in proper form and sufficiently signed having been duly presented, the board ordered an election, which was regularly and fairly held, and which, as appears by the canvass and return made by the election commissioners filed with the board of supervisors, resulted as follows: Total votes cast, 904. For removal, 644; against removal, 260; for removal to Edna, 626—Edna being the only point competing for the location of the county site and the only point placed on the ballot to be voted for. Upon the coming

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in of this report, the board of supervisors passed an order reciting that after careful consideration of the tabular statement of the vote cast, it "appearing to the satisfaction of the board that 'removal' carried by receiving a majority of the votes cast at said election, and that the town of Edna received a majority of the votes cast at said election," it was therefore ordered that the seat of justice of the county be moved to the town of Edna. Before this order of removal could be carried into effect, one Weathersby, a citizen and taxpayer of said county, obtained from the chancery court an injunction restraining the removal on the ground that the removal of the seat of justice had not been authorized by the affirmative vote of the proportion of the qualified electors of the county required by Constitution 1890, sec. 259. Subsequently a final decree was rendered dissolving the injunction and dismissing the bill of complaint filed by Weathersby. Immediately upon the termination of the Weathersby suit the board of supervisors procured a temporary courthouse at Edna, and removed the seat of justice and all the records of the county to that point. Thereupon Buckley and some hundreds of the taxpayers of the county (appellees here) filed their bill of complaint, setting out above facts and charging that the board of supervisors had sold bonds for the purpose and then were about to proceed to the construction of a new courthouse and jail at Edna; that they intended to sell the county buildings at Westville, and invest the proceeds thereof, together with the proceeds of the county bonds, in the new public buildings which they contemplated erecting at Edna. An injunction restraining such action by the board was prayed and granted. The averments contained in the bill on which the granting of the injunction was based were these: That at the election which had been ordered by the board of supervisors pursuant to ch. 149, p. 201, Acts 1900, submitting the question of removal of the seat of justice to the electors of the county, "removal" had not "carried" within the meaning of that act and sec. 259 of the constitution, because at the election so holden less than two-

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thirds of the qualified electors of the county had voted for removal; that Edna, now called "Mendenhall," was further distant from the center of the county than Westville, and, this being true, in order to authorize the board of supervisors to make any order in the premises, it was necessary that two-thirds of the qualified electors of the county should vote therefor; that the order of the board of supervisors directing removal not only failed to show that the constitutional majority did vote for the removal, but expressly negatived the existence of that fact.

It will be noted that the order directing the removal of the county site to Edna affirmatively shows that "removal" received "a majority of the votes cast at said election," without stating that that number was a two-thirds majority of the electorate of the entire county. It further appears that "the town of Edna received a majority of the votes cast at said election." Upon final hearing the chancellor decreed as issues of fact that the number of votes cast at the election for "removal" did not constitute two-thirds of the electors of the county qualified to vote at the date of the election, and that Edna was further away from the center of the county than was Westville, and rendered a final decree annulling the action of the board, as hereinbefore set out.

Upon this appeal it is urged by appellants that the Weathersby suit was a "class" suit; that Weathersby was, in the eyes of the law, a representative of all other citizens or taxpayers occupying a similar relation; and that an adjudication against him in his representative capacity is conclusive against all others, including these appellees. We cannot concur in this view. The facts of this case do not bring it within the scope of the beneficent doctrine invoked. The decree of the chancery court in the case of *Weathersby* v. *Board of Supervisors* was not such a final determination of the legality of the order for removal of the county site as to preclude the present appellees from prosecuting this suit. The rule of law by which a representa-

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tive suit is held to preclude the bringing of other similar suits is based upon the assumption that all parties in the same class are privies to the original complaint, and occupy the same relation with regard to the subject-matter involved, and therefore one litigation, when honestly and fairly conducted to a final termination, is considered as conclusive of all others. The wisdom of the rule is undeniable, in that it prevents the institution of multiplicity of useless, frivolous, and vexatious suits about a question of mutual, general, or public interest which has already been fairly considered and finally adjudicated by a court of competent jurisdiction. But the fundamental idea on which the principle is based is that the original suit must not only be honestly instituted, with the real intention of settling the matter, but must be honestly prosecuted to a final termination as well. The Weathersby case was not such a suit. While honestly instituted and fairly conducted, it was not prosecuted to a final adjudication. The express terms of the final decree rendered therein show that it was either a consent decree or the result of a compromise. It says that "the complainant agrees not to further prosecute the suit, and the defendants agree that the complainant and the estate of said T. H. Weathersby and their sureties be absolved from all liability for damages because of the suing out of the injunction herein." It shows that the complainant not only did not prosecute the suit to a conclusion, but that it was abandoned, and that in consideration of such action the complainant and sureties were released from the liability which would necessarily have flowed as a legal incident to a final decree adverse to them and dissolving the injunction which had been granted. It is true that the decree recites that the case was set down for hearing "for the purpose of finally settling the merits of the case," and that the court ordered that "said bill be dismissed as an adjudication of the merits of the questions involved in this controversy." But when these recitals are considered in connection with the statements above noted that the complainant had abandoned his suit, it becomes

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manifest that it is not, in a legal sense, such final adjudication as should rightfully preclude others from subsequent prosecution of any rights they may have in the subject-matter of the litigation. The principle of law involved in this question is elemental, and we deem citation of authority unnecessary, especially in view of the fact that there is no dispute as to the soundness of the legal proposition, the contention being as to its applicability to the facts disclosed by this record. The express recitals of the decree show that appellants are not entitled to set up the bar against the prosecution of further suits which is interposed in certain instances by the legal principle in question, and the correctness of this is made more manifest by a reference to the testimony where the negotiations which resulted in the abandonment of the Weathersby suit by the complainant are detailed with particularity. This decree, undeniably the result of a compromise, though perfectly fair in all its features, is no bar to a similar suit brought by parties not privy to, nor consulted in reference to, the original action.

The next contention presented by appellants is that as no direct appeal was taken from the order of the board of supervisors, its judgment cannot now be collaterally attacked. The argument is based upon the settled doctrine that, even though a court be one of special or limited jurisdiction, so that it is necessary for the jurisdictional facts authorizing its judgment to be recited affirmatively in the judgment, still, when this is done, the same presumption of correctness attaches to the decision of such special tribunal as does to those of courts of general jurisdiction. So it is said as one of the orders of the board in question does expressly recite the presentation of a petition, duly and properly signed, as required by ch. 149, p. 201, Acts 1900, that this was the only jurisdictional fact requisite to vest power in the board and authorize it to take all necessary action in regard to the removal of the county site; that all other questions are simply evidential, and need not be set out specifically in the judgment. It is said that, the board

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being vested with jurisdiction by the filing of a proper petition, its subsequent actions are presumed in law to be correct, and cannot be collaterally questioned or assailed; and, further, that, jurisdiction having once attached, the failure of the board to recite either that two-thirds of all the qualified electors of the county voted for removal, or, in the absence of such fact, that Edna, the proposed county site, was nearer the center of the county than Westville, is simply a failure to embody in the judgment the evidence on which the judgment was rendered, and, under the general presumption of correctness of judgments, cannot be ground of attacking its validity or force, because, it is urged, in the absence of a recitation of the evidence, the correctness of the judgment of the special tribunal will be presumed, and the judgment will be dealt with as if proof was before the board of supervisors showing either that two-thirds of the qualified electors did vote for removal or that Edna was nearer to the center of the county than was the present county site. The soundness of the general doctrine that where the jurisdictional facts authorizing action by a special court or tribunal of limited jurisdiction are affirmatively set out in the judgment such judgment is entitled to the same presumption of correctness and validity as attaches to judgments of courts of general jurisdiction is undeniable. But counsel for appellants misconceive what constitutes the jurisdictional facts in the case at bar, if in truth that doctrine has any application here. Prior to the adoption of the constitution of 1890 the location and removal of county sites was a question submitted solely to legislative discretion and will. *Monet* v. *Jones,* 10 Smed. & M., 237. By sec. 259 of the constitution, county sites throughout the state became fixed and established at the places where they were then located. There they must remain until removed in the manner and by following the method indicated by that section—not by legislative enactment, not by order or judgment of the board of supervisors, but by the affirmative vote of the electorate of the county concerned. If the county site is to be re-

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moved to a point more distant from the center of the county than where now located, it must and can only be done when two-thirds of all qualified electors of the county shall evidence their desire for such removal by an affirmative vote therefor. Or, if the removal is to a point nearer the center of the county, and therefore presumably more accessible to the greater portion of the inhabitants of the county, such removal will be authorized by a majority vote of those who participate in an election specially held for the purpose of submitting that question to the arbitrament of the ballot. In either case the fact, and the only fact, which can give the legislature, or the board of supervisors, or any other legislatively designated or selected tribunal, jurisdiction to pass any order in the premises, is the affirmance of the required constitutional majority. It is not the legislative enactment; it is not the expressed approval of the people voting therefor. The method by which the will of the people shall be ascertained is submitted to legislative discretion, but the will of the people affected by the contemplated removal is at last the only power by which a county site can be removed. In the instant case the presentation of a proper and sufficiently signed petition to the board vested it with no jurisdiction to make any order of removal. It was within the legislative province to have itself called an election for the purpose of submitting the question to a vote or to have empowered the board of supervisors to call an election without the intervention of any petition; but no power can avoid or evade the constitutional provision that no order of removal can rightfully be made by any court or tribunal until authorized by the affirmative vote of the qualified electors of the county.

It is said that, as the presentation of the petition vested the board of supervisors with jurisdiction to call an election, this necessarily carried with it the power to decide how the election resulted; that if it had jurisdiction to say that removal did not carry, it had equal power and right to decide that removal did carry, and, being vested with power to decide, its decision must

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stand until reversed on direct appeal. But the premises are unsound, and the deduction necessarily erroneous. The power of the board to order a removal of the seat of justice did not depend on the recitation by the board in its order that two-thirds of the electors voted for removal, but upon the actual existence of the concrete fact. If such number did not vote for removal, the board had no authority to make any order, for the reason that the power by which alone the location of a county site can be changed cannot be put in motion except by the positive action of the voters. Until this action is taken, the power remains dormant, and the county site cannot be moved. If the constitutional majority fail to vote favorably on the question of removal, no order is required, because the contingency on which alone a change can be made has not happened, and the jurisdiction of the board over the subject-matter has never attached. As pertinent in this connection, and involving the same question of constitutional construction, we refer to the case of *Hawkins* v. *Carroll County,* 50 Miss., 735. In that case the exact point was whether the county could lawfully issue bonds in order to grant aid to a railroad. The then existing constitution provided that authority to give such aid should not be granted "unless two-thirds of the qualified voters of such county . . . at a special . . . or general election shall assent thereto"—practically, it will be noted, identical with the provision under review in the case at bar. In that case, as in this, the board of supervisors held that the project had carried, and that, therefore, it was empowered to order the issuance of bonds. In that case, as in this, it was contended that this judgment was conclusive. After elaborate argument by a glittering array of eminent counsel, the court, in the course of an exhaustive discussion of the entire subject as to the two contentions above referred to, held as to the first: "If empowered so to do, it must conform to the conditions prescribed in the law. By the statute the board of supervisors is made the organ and instrumentality of the county. But its power does

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not come into existence except upon certain conditions, which are of the nature of conditions precedent. Those are an approving vote of the constitutional majority at an election assenting thereto. If the requisite notice of the election has not been given, or it has not been held at the proper time and place, or if no election at all has been held, or, if held and the proposition has not received the requisite vote, then the terms upon which the board can put in motion its statutory power to make the subscription and issue bonds have not come into existence. If these or any of these recitals are true, a subscription would be invalid and the bonds would be without warrant of law to uphold them." As to the second: "It has been urged also that the decision of the supervisors that the project was approved is conclusive on the county. That which confers the authority on the board is the vote of the two-thirds. The canvass of the votes and decision of the board is but evidence of the fact. If the requisite favorable vote has been actually given, then the condition has occurred upon which the county can insist upon the aid being given, and the railroad corporation has a right to demand the subscription and bonds. The conclusion of the board that the majority has been one way or the other is not conclusive on the taxpayers or the railroad corporation. The authority to the board passes or fails to pass by the vote." See *Doan* v. *Board of Com'rs,* 3 Idaho (Hasb.), 781 (26 Pac., 167); *Sweatt* v. *Faville,* 23 Iowa, 321; *Krieschel* v. *Co. Com'rs,* 12 Wash., 435 (41 Pac., 186); *Braden* v. *Stumph,* 16 Lea, 581; *Presidio Co.* v. *Jeff Davis Co.* (Tex. Civ. App.), 77 S. W., 278; *Cocke* v. *Gooch,* 5 Heisk., 294; *People* v. *Wiant,* 48 Ill., 267; *Bouldin* v. *Lockhart,* 1 Lea, 195.

We refer specially to the case of *Braden* v. *Stumph, supra,* where every material question except one here pressed by appellants is carefully considered and decided adversely to their contention. The constitutional provision there under consideration recites: "Nor shall the seat of justice of any county be removed without the concurrence of two-thirds of the qualified voters

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of the county." The court construed this clause to mean that two-thirds of the voters must actually vote for the removal; that active concurrence, and not passive acquiescence, was required; that the action of the county court in counting the votes and declaring the result was not final and conclusive; and that the chancery court properly entertained a bill of complaint of sundry citizens and taxpayers enjoining the attempted illegal removal. And upon a petition for a rehearing the court again rejects the contention that the decision of the county court in announcing the result was conclusive and that the courts were without power of review, saying: "But the counting of the vote of a popular election is merely the finding of a fact, even if done by the legislature, and is not conclusive upon the rights of third parties. And the real question is whether such finding and announcement, whether legislative, judicial, or ministerial, are conclusive upon individuals immediately affected by them in their constitutional rights, or may be reinvestigated in the courts. . . . The constitutional provision in regard to the removal of a county seat was intended to protect the rights of property acquired by the location of a county seat, and those property rights are analogous to the property rights of a county over its territory. Either for this or some other reason this court has heretofore repeatedly recognized these rights, and allowed them to be asserted, even after an actual removal of the county seat." We adopt this reasoning without reservation.

The order of the board in question in the instant case negatives the idea that the constitutional majority of two-thirds required in cases where county seats are to be removed to a point more distant from the center of the county was cast therefor. This of itself, in the absence of the alternative recital that Edna was nearer the center of the county, is fatal to the validity of the order attempting to remove the seat of justice to that point; for upon the existence of one or the other of these two facts the power and authority of the board of supervisors, its jurisdiction

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of the subject-matter, was absolutely dependent. And this would be true even in the absence of proof that the total vote cast at the election for "removal" was less than two-thirds of the qualified electorate of the county. On this point it should be noted, what we have hereinbefore referred to, that the chancellor found as a matter of fact that less than two-thirds of the qualified electors voted for the removal. The record contains ample proof, both competent and admissible, to sustain this conclusion. The testimony of the election commissioner as to the number of names remaining on the registration books after all erasures for disqualification for legal causes had been made showed that considerably less than two-thirds of the qualified electorate voted for removal. The law imposes certain duties in reference to the registration books upon the board of election commissioners, intended to insure that they shall only contain names of those duly qualified to vote. Testimony showing the number of names remaining in such book after erasure therefrom of the names of all persons erroneously thereon, or who have died, removed, or become disqualified as electors, is competent, though not conclusive, proof of the number of qualified electors in the county. See *Hawkins* v. *Carroll County, supra;* Code 1892, § 3635. One of the board of election commissioners testified that after all erasures it is certain that there were over 1,221 registered voters at the date of the election, of whom 644, a bare majority, voted for "removal."

Finally, it is urged on behalf of appellants that, even conceding that the board of supervisors exceeded their authority in directing the removal of the seat of justice to Edna, still the order is valid in its recital that removal from Westville was carried, because it affirmatively shows that more than a majority of the electors participating in the election voted for removal, and this, both under the constitution and the act, operated to effect removal from the present site to some point hereafter to be selected by the voters. If this be sound, the decree herein must be reversed, and the cause remanded, with direction to the

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board of supervisors to order another election, to determine at which one of the several competing points the county site shall be permanently located. It is true that the act empowering the board to order an election does contemplate the possibility of holding several elections to determine the relocation of the county site. It is also true that, if "removal" received the number of votes required by the constitution, it would have been proper for the board to order an election simply to decide between competing points. But under the facts of this particular case this cannot avail the appellants, for the manifest reason that only one point was voted for at the election—namely, Edna—and that, according to the proof, is more distant from the center of the county than the present location of the county site. In order for removal to carry in favor of a named point, the same constitutional majority would be required to make any change of the county site that would be necessary to move it to the particular place voted for; otherwise we would have the anomalous condition of a change authorized by a mere majority of those participating in the election, and therefore necessarily toward the center of the county—in fact, effecting a relocation at a point more distant from the center; thus, in effect, abrogating the constitutional requirement. The argument is faulty, in our judgment, in assuming that a county site can be ordered removed by a majority vote of those participating in the election, and then, at a subsequent election, the relocation fixed at a point more distant from the center of the county. Nor can this be overcome by saying that at a subsequent election the choice for the location of the seat of justice can be restricted to points nearer the center of the county than the present site. The insuperable obstacles to this course are several: (1) The law authorizing the election provides that at the election to determine "point of location only" "the two points which received the highest number of votes at the first election shall be submitted to be voted upon." In the instant case this plain mandate cannot be followed, because there are no two competing points that

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received votes at the first election. (2) To move the county site to the only place voted for at the first election would not be a move towards the center of the county, while the vote cast only authorized a removal, if at all, on condition that such move should be to a point nearer the center. (3) The act under consideration expressly recites that, if the seat of justice be moved, it must be to "some convenient point on the Gulf & Ship Island Railroad." While, so far as the proof shows, and referring to the general course of the railway as indicated on the maps in evidence, it is doubtful if there is any point on said line of railway nearer the geographical center of the county than is Westville, if this be true, and appellants' contention on this point be sustained, and were we to hold that removal from Westville had carried, and remand the cause, and direct another election to be held to decide between competing points on the Gulf & Ship Island Railroad, we would be in the position of having ordered an election to be held to locate a new county site, when in point of fact, under the express terms of the act authorizing the election, there would be no point eligible to be voted for, because no point on the Gulf & Ship Island Railroad would be nearer to the center of the county—the only way in which a removal had been authorized by the vote of the electors. And, at all events, the selection of a location would necessarily be confined to points not voted for and not competing for the location. This could only be done by flagrantly violating the provisions of the act now under consideration.

This brings us to the consideration of another serious question in the case—one which, not being presented, and being constitutional in its nature, we are forbidden by the recognized canon of decision to decide on this appeal, and yet one which, in view of the public interest involved in this matter, we are not content to pass over unnoticed. And we propound to counsel, as worthy of their serious consideration, the query: Is or is not ch. 149, p. 201, Acts 1900, under which this election was held, unconstitutional and void? For this reason: The constitutional provision

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leaves the decision of the question of the removal and relocation of the county site solely and absolutely to the electors of the county. As the electors can alone decide whether the county site shall be moved at all, and, if so moved, whether towards or away from the center of the county, was it or not the constitutional design that their choice of location should be left untrammeled and unrestricted? So that they, being most deeply concerned in the welfare of the county, taking into consideration natural conditions, waterways, density of population, highways, bridges, means of transportation, and the manifold incidents which would necessarily sway an elector's judgment, might have absolute freedom of choice in determining what location of a county site would best conserve the public interest and be more conducive to the general convenience. If these inquiries can only be correctly answered in the affirmative, then what power had the legislature to restrict the voters in the selection of a county site to a point on the Gulf & Ship Island Railroad? If the electors of Simpson county had desired to move their county site to any particular portion of or point in the county, did the legislature have the authority to deny them that right by providing that the county site, if moved, could only be relocated at some point on the railroad named? Without expression of opinion further than hereinbefore indicated, we suggest, if further action in regard to the attempted removal of the county site be contemplated, the advisability of procuring another legislative enactment which shall leave the electors of the county at liberty to relocate their county site, if they should so desire, without any limitations or restrictions as to place or location.

It follows, from the views that we have hereinbefore announced, that the action of the board of supervisors of Simpson county in passing the order directing the removal of the county site to Edna was void; wherefore the decree of the chancery court is affirmed in all respects, save that the board of supervisors of Simpson county are hereby granted six months from date of the filing of the mandate in the court below in which to

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make necessary repairs in the courthouse at Westville and return all records of said county to that place. In view of the doubt and confusion which we are told has arisen in regard to the validity of judicial action taken subsequent to the attempted location of the county site at Edna, we state that all such action is as valid and regular as though held in the courthouse at the regular county site.

Decree affirmed, and injunction made perpetual.

DANIEL COOK *v.* STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Homicide. Evidence. Boasting.*

   Testimony is admissible in a murder case to show statements made by the accused, several hours after the killing, boasting of the deed.

2. SAME. *Co-defendant. Previous conviction of crime.*

   It is not competent in a murder case to show that defendant's brother, who participated in the killing and had been indicted therefor, had been convicted of crime two years before in a municipal court then presided over by the deceased, where the evidence showed that the killing arose out of the occasion, without reference to any previous trouble.

3. SAME. *Witnesses. Code* 1892, § 1746.

   Under Code 1892, § 1746, authorizing the interrogation of witnesses as to whether they have been convicted of crime, in order to determine their credibility, testimony of a conviction cannot be given by others until the witness has first denied the same.

4. SAME. *Instruction. Assumption of fact.*

   Where at the time deceased picked up a weapon the defendant was being securely held by two men and therefore unable to make an attack, an instruction which assumes that the deceased picked up the weapon to defend himself from an assault by defendant is erroneous.

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5. SAME. *Murder or manslaughter. Question for jury.*

Whether a defendant was guilty of murder or of manslaughter should be left to the determination of the jury, although the evidence shows an unpremeditated killing by defendant's brother in response to the request of defendant who had just been engaged in a fight, and was being held by two men, confronted by deceased armed with a stick to attack some one, when he made the request.

6. SAME. *Presumptions of innocence.*

All persons are presumed to be absolutely innocent of a crime charged against them, in its entirety, and in all its material parts, until the jury finds to the contrary on proper instructions, based on competent and relevant testimony.

FROM the circuit court of Calhoun county.

HON. WILLIAM F. STEVENS, Judge.

Cook, the appellant, was indicted, tried, and convicted of murder, and appealed to the supreme court. The facts are fully stated in the opinion of the court.

R. V. Fletcher, for appellant.

Various witnesses were permitted to testify to statements made by defendant, and some made by defendant's brother after the difficulty was over. These statements were made when the prisoners were arrested, and some two or three hours after the difficulty.

These are, of course, no part of the *res gestae*. They can be competent only on the theory of a conspiracy, so far as the statements of the brother are concerned. It is well settled that the declarations of a fellow-conspirator cannot be admitted in evidence if such declarations are made subsequent to the consummation of the crime and unless facts of the conspiracy are shown otherwise than by the declarations of the alleged conspirators. *Gillum* v. *State*, 62 Miss., 547; *Garrard* v. *State*, 50 Miss., 147; *Simmons* v. *State*, 61 Miss., 243.

Coming now to the consideration of the very damaging testimony of the witness Lawrence Monahan. The witness testi-

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fied that the alleged threat was made two or three years before the homicide, that it was directed toward Crawford as one of a larger class, that the condition of the threat was never fulfilled. This court has decided flatly that a threat made three or four years before the killing is too remote to be introduced in evidence. *Mackmasters* v. *State,* 81 Miss., 374. And it has further decided that a threat made twelve months before the affair is remote and subject to objection. *Owens* v. *State,* 80 Miss., 499.

Besides, how could this statement be competent when the condition of the threat had never happened? Put into the form of a syllogism, it is as perfect a *non sequitur* as one might ever confront. Thus: If Crawford makes me pay out any more money, I will kill him. But Crawford has never made me pay out any more money; therefore I will kill him, and do kill him. The only effect of permitting such testimony as this is to mislead the jury and get before them for their consideration certain foreign and irrelevant matter, showing that defendant was a crap shooter and that he went about making threats. This will not do. *Raines* v. *State,* 81 Miss., 489.

Even more objectionable, if possible, is the testimony about the convictions in the mayor's court of Ellzey. It should be remembered that these were convictions, not of defendant, but of the brother of defendant, the other Cook. They were three and two and a half years, respectively, before the killing; they were too remote in point of time to be competent. *Herman* v. *State,* 75 Miss., 340; *Raines* v. *State, supra.*

And, besides, they could furnish no motive for the crime. They were not convicted by Crawford; there were pleas of guilty in both cases. The fines were absurdly small. The affidavits were made out by another in each case. They did not affect this defendant. They only served to besmirch the character of the brother and co-defendant, and show that he was guilty of other and disconnected crimes, foreign to the issue then on trial. As such, they are subject to the very criticism that was so ably passed on the evidence in the Raines case. No

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attempt had been made by defendant to show his good character or that of his co-defendant at that time, and yet these record proofs of convictions were brought in, tending to break down his character in violation of well-settled principles of evidence. *Kearney* v. *State,* 68 Miss., 233.

The second instruction for the state is open to the serious objection that in attempting to detail and recite the facts of the case, it omits an important feature which was admittedly true. For all the witnesses agree that when Crawford went out of the gate and faced about toward defendant, who was on the opposite side of the fence, and when Crawford picked up the brick or stick, defendant was securely pinioned from behind, being held by two men; in other words, defendant was at the time *hors de combat.* The instruction under review ignores this important fact, and charges the jury that if Crawford picked up the brick or paling to defend himself against the threatened attack of defendant, and that then defendant cried out, "Cut him, Lon," etc., and that Alonzo Cook heard this and acted on it, and stabbed Crawford, then defendant is guilty as charged. The jury is therefore informed in effect that the helpless condition of defendant, held a secure prisoner at the time, had no probative force in influencing their verdict. An instruction attempting to recite facts must recite all that are material, the circumstances favorable to defendant as well as those favorable to the state. *Wilburn* v. *State,* 73 Miss., 245; *Jackson* v. *State,* 66 Miss., 89.

J. N. Flowers, assistant attorney-general, for appellee.

A short while before the tragedy this accused was in a fight with other persons, and had just been separated from them. At the time Crawford was stabbed by Alonzo Cook, this accused had an ax in his hands, but was being held by Young and others. He was mad, cursing and threatening. Crawford had no part in the former difficulty in which appellant had been engaged, but happened to walk up just after the said difficulty had been

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settled and about the time appellant was caught by Young. Appellant notified the crowd that it was safer for them to stand away from him, telling them at the same time that he would kill every one of them, and when he saw Crawford appear within a few feet of him, he said: "You stand back too, G—d d—n you! I will kill you." It seems that about this time Crawford, having walked a few feet inside of the yard through the north gate, walked back through the gate, and Alonzo Cook followed him on the outside; that about the time they got through the gate appellant called to his brother to shoot Crawford and kill him. And then about the time appellant made this exclamation, Alonzo stabbed Crawford in the left breast about the heart. Crawford fell on his face, and was dead in a few minutes.

Crawford was mayor of the village, and had been mayor, it seems, for several years. He appeared on the scene on this occasion as a peace officer. Nobody pretends he was there to take any part in any difficulty as against these two boys. Nobody says that he spoke a single word to these boys or to any one else. As soon as he appeared their attention was directed towards him of all the men in the crowd, and their attention seems to have fastened upon him until he was on the ground. He is said to have been a strong man physically, and was prominent in the community.

The reason for the joint attack made by these boys on this man can only be found in the fact that they were mad at him because of his dealings with them as mayor of the town. He had had occasion several times to place a penalty upon Alonzo Cook, who, it appears, charged Crawford up with his indictment in the circuit court. The two boys were together, taking each other's part in this fight, and taking each other's part, doubtless, through the long list of grievances which they had against this man.

While the court held, in McMasters' case, that a threat made by the accused five years before he killed his father was too

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remote, yet the court did not mean to say that the age of the threat must necessarily be less than five years. In that particular case the threat was held to be too remote, but there may be circumstances under which a threat of that age may be proved. In the case at bar, it seems that the threat grew out of the same circumstances as prompted the killing.

There is no rule of evidence which requires that threats of this kind must be unconditional. There may be circumstances under which a conditional threat may not serve the purpose for which an unconditional one can be used, as where one might show a threat to justify an assault. But in a case like the one at bar, the threat shows the state of mind of the man making it; it shows existence of malice; it shows that he held Crawford as an enemy. "The mere fact, however, that it (the threat) is expressed in the alternative or upon a condition or contingency does not destroy its probative value, but the intervening fulfillment of the condition should ordinarily be shown, if it occurred." Wigmore on Evidence, sec. 107; *Reed* v. *State,* 68 Ala., 492, 496; *Phillips* v. *State,* 62 Ark., 119 (s.c., 34 S. W., 539); *Com.* v. *Crowe,* 165 Mass., 139 (s.c., 42 N. E., 563); *State* v. *Johnson,* 76 Mo., 121, 124; *State* v. *Sloan,* 22 Mont., 293 (s.c., 56 Pac., 364); *State* v. *Bradley,* 67 Vt., 465 (s.c., 32 Atl., 240).

The statements made by appellant to his brother after the killing were clearly admissible. They were admissions; they amounted to confessions; they demonstrated the purpose, the general purpose, of the two; they showed the presence of malice and design. In fact, more valuable or competent testimony could hardly be presented to the jury. Its admissibility is not dependent upon any proof of conspiracy.

Argued orally by *R. V. Fletcher,* for appellant.

CALHOON, J., delivered the opinion of the court.

Daniel Cook and Alonzo Cook are brothers. They were jointly indicted for the murder of Robert L. Crawford, who was

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slain on June 7, 1903, by a stab with the large blade of a Barlow knife in the hands of Alonzo Cook. Severance was had, and separate trials, in both of which convictions were had, and Alonzo Cook sentenced to the penitentiary for life, and Daniel Cook, the appellant, sentenced to be hanged.

In the essential features of the case, as to the occurrences at the time of the homicide, the testimony was quite conflicting. The killing occurred on a Sunday at a place where there was a Sunday school celebration progressing in a church close by the scene of the killing. There was a large crowd there, and it is clear that appellant had a difficulty with some men called the "Blue boys," in the house of a Mr. Young, which was not very far from the church. In that difficulty the appellant was either ejected from or fell out of the house, and his arm and hand were injured, and his hand was bleeding. At this point, one Hollis, a constable, arrested appellant, and he was kindly taken by the constable to a well or cistern in the rear of the house to wash the blood off his hands. Appellant was very much excited, and saw an old ax, which he seized, and came back to where a crowd was. He was cursing and swearing, and told everybody to stand back, or he would kill them; and as the deceased, Crawford, came around the house, appellant said: "Here you are. I will kill you." But he did not call anybody's name. Several persons were standing near appellant, and in front of him; and thereupon the constable, Hollis, and a Mr. Young, who were stout men, took hold of appellant on each side, and held him securely, pinioning his arms to his body. While things were in this situation, Crawford walked out of the gate into another inclosure, Alonzo Cook walking just behind and passing him. Some of the witnesses testify that appellant said, "Kill him, Lon; cut him!" whilst others, even of the state witnesses, say he said, "Kill them, Lon; cut them!" Many of the state witnesses testify that Crawford, after getting out of the gate, stooped and picked up a paling, and subsequently a brick, and was facing appellant, and that thereupon Alonzo Cook

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turned and stabbed him. Witnesses for the appellant said that when Crawford went through the gate he stooped and picked up a brick and threw it at Alonzo Cook, who was standing there doing nothing, and that then Crawford picked up a stick and advanced upon Alonzo Cook, and then Cook stabbed him. It seems clear that Alonzo Cook came behind Crawford, and passed him and got several paces in front of him before he turned and stabbed him, and it might be a fair inference by the jury that he did not stab him until Crawford made a demonstration against either him or Daniel Cook with a stick or a brick. It should be noted that all this time appellant was being securely held by Young and Hollis, and that there was a crowd there, and that N. G. Blue, a witness for the state and a relation of the deceased, testified that he was standing nearer to appellant than Alonzo Cook was, and that he did not hear appellant say anything about cutting or stabbing anybody.

On the trial the court allowed the witness Hollis to testify that, about two hours after the killing, appellant caught his brother, Alonzo, around the neck and said, "I have got a brother who had the gizzard to do what we have wanted to do for a long time," the admission of which is assigned for error. The court allowed the witness Enochs to say that, two or three hours after the difficulty, appellant's brother, Alonzo Cook, said, "Yes, I killed him, and I did exactly what I intended to do," and that appellant thereupon slapped Alonzo on the breast and said: "Yes, I told you to do it; and, by God! we have killed the bully of this town, and made ourselves a reputation." We think this testimony competent and properly admitted.

The court allowed one Monahan, a state witness, to testify that, two or three years before the killing, he and appellant and his brother, Alonzo, were in the woods, playing "craps," and, while there, deceased and one Cook came towards them, and appellant said to witness that "if Cook, Crawford, and Hiller made him (the appellant) pay any more money he intended to kill them." There is no evidence whatever of any previous

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conspiracy between the brothers to kill Crawford, nor is it shown anywhere that appellant was ever made to pay out any money by any of these men, or that he ever paid out any money.

The court allowed the state to introduce the docket of the mayor of the village of Ellzey (who was Crawford, the deceased) to show that, some three years before, one Hiller made an affidavit against appellant's brother, Alonzo Cook, before Crawford, the mayor, charging, not the appellant, but his brother, Alonzo Cook, with gambling, and that Alonzo pleaded guilty, and was fined $1 and costs, which he at once paid. The court also permitted the state to introduce the docket of the same mayor to show that in January, 1901, two or three years before the killing, one Blue made an affidavit before Crawford, the mayor, charging, not the appellant, but his brother, Alonzo Cook, with an assault on one Hiller, and that Alonzo pleaded guilty, was fined ten dollars, and at once paid this. The court also allowed the state to introduce the records of the circuit court of the county to show that at the September term, 1900, not the appellant, but the appellant's brother, Alonzo Cook, was indicted for gambling; and the court allowed the indictment in this case to be presented to the jury, with the writing on the back of the indictment by the jury, finding Alonzo Cook guilty, and to show that he was sentenced to pay a fine of $150. This was two or three years before this killing. The court also allowed witness McCormick to testify that in the year 1900, being two and one-half years before the killing, he, as deputy sheriff of the county, arrested, not the appellant, but his brother, Alonzo, on the charge of gambling, and that Alonzo said that "Bob Crawford was at the bottom of the matter, and if it had not been for him, the bill would not have been found." We will say now, without further delay, that these introductions of dockets of convictions of appellant's brother several years before the killing were entirely inadmissible. It was too remote. It is not possible that they could have shown any motive for the killing, which, from the testimony, arose simply out of the occasion, and without

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any reference to any previous trouble. We understand that Code 1892, § 1746, has no sort of reference to the condition of things upon which the court acted in the case before us. That section simply permits witnesses to be interrogated as to whether they had been convicted of any offense—the purpose being, of course, to go to their credibility—and the statute allows their statement to be contradicted; but it is nowhere provided by the law, even upon this matter of credibility, that testimony might be introduced as to the conviction of a witness unless the witness had first denied it. We discard now, as utterly irrelevant and immaterial and too remote, any testimony as to what was done to Alonzo Cook by the courts.

Instruction No. 2 given for the state is erroneous. It is based upon a recital of facts of the case, but is absolutely silent as to the well-established fact that appellant was securely held by Young and Hollis at the time when the instruction wants the jury to assume that Crawford took up the brick or stick to defend himself from an assault by appellant. Any charge to a jury which undertakes to give the facts must give all which are material, whether favorable to the defendant or the state. This is thoroughly well settled by numerous adjudications of this and other courts, which will be found in the brief of counsel for appellant. Certainly no conviction can be upheld, where the facts are controverted, based upon an instruction which assumes, as this does, that Crawford, the deceased, picked up a brick or stick to defend himself against the attacks of Daniel Cook. No witness testifies to this, and it was impossible that Crawford could have been apprehensive of an attack from the appellant, who was being securely held.

The twenty-second instruction asked for by the defendant should have been given, though we might not reverse for this alone, because of the number of the charges. It simply says that, even if the jury believe that Alonzo Cook was guilty of murder, and also believe that appellant said, "Cut him, Lon; shoot him!" and even though Alonzo acted on these words, yet

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appellant could be guilty of no more than manslaughter, if appellant's declaration was made in the sudden heat of passion. Appellant and Alonzo were each responsible only for what he did, unless there was a previous conspiracy to commit the crime. The difficulty arose without premeditation of the parties, as seems manifest. It is undisputed that Alonzo Cook was sitting in a buggy, talking to a friend, at the time of the origination of the trouble, and that, hearing the row, he went to the place where his brother, the appellant, was, in a fight with the "Blue boys," and that he did not have on that occasion any communication whatever with appellant before the fight. From the testimony of state witness Young, it is not clear that the jury might not infer that appellant, if he used the words, meant them for the men who had hold of him, not for Crawford. Appellant had done nothing to Crawford; Crawford had armed himself with a brick or stick to attack somebody; he was in front of appellant; and if appellant had then and there broken away and killed Crawford, it should have been left to the jury to say whether he had committed manslaughter or a crime of graver import. And if the jury might so find if the appellant had done the killing, was it any graver for him, under the circumstances, to call out to others to kill? If the act of Alono was murder, nevertheless, the jury should not be excluded from considering the surroundings of appellant in making up their verdict, and in the determination of the question whether, as to him, it was manslaughter or murder. This becomes of more force when we consider that many of the witnesses, even for the state testified that appellant said "Cut them," instead of "Cut him," and the jury might conclude that the remark was not directed at Crawford.

The rules of law for the conduct of criminal trials are for the benefit of the whole society and for the protection of the innocent; and all persons are presumed to be absolutely innocent of the crime charged, in its entirety and in all its material parts,

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until the jury finds to the contrary on proper instructions, based on competent and relevant testimony.

We do not decide in this case any of the questions as to the competency of jurors, nor, indeed, do we decide anything not expressly disposed of in this opinion.

Reversed and remanded.

WILLIAM W. WHITFIELD ET AL. v. JOHN G. THOMPSON ET AL.

WILLS. *Power of sale. Construction. Failure to sell. Estate taken by heirs.*

The provision of a will by which certain lands are or are not to be sold by the executor in his discretion constitutes a disposition thereof, so as to exclude them from other provisions of the same will by which all lands not otherwise disposed of were directed to be sold without reference to the discretion of the executor; and on failure of the executor to sell the first-mentioned lands the heirs took them in fee.

FROM the chancery court of Clay county.

HON. HENRY L. MULDROW, Chancellor.

Whitfield and others, appellants, were complainants, and Thompson and others, appellees, defendants in the court below. From a decree in favor of defendants, the complainants appealed to the supreme court.

The bill of complaint charged that they were the children of W. W. Whitfield and the only grandchildren of Wm. Whitfield; that Wm. Whitfield died in the year 1854, possessed of large bodies of land, then in Lowndes county, now Clay county; that he had three children—W. W. Whitfield, John A. Whitfield, and Lucy A. Whitfield; that John A. and Lucy A. Whitfield died intestate, leaving no issue;

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Statement of the case.

that said Wm. Whitfield executed a last will and testament, which was duly probated and recorded (the material parts of the will are set out in the opinion of the court); that the land in controversy was a part of the land owned by Wm. Whitfield at the time of his death, but was no part of the land specifically devised in the will, but was a part of the residuum; that it was never deemed necessary by the executors to exercise the power never deemed necessary by the executors to exercise the power of sale over it given by item twelve of the will, and that there never was any pretense of a sale of it by the executors, and as the power was never exercised, it had lapsed; that by item thirteen the lands were devised to the executors, with express and direct order to sell and reinvest the proceeds in other property, to be held for life by the children of Wm. Whitfield, and at their deaths to his grandchildren; that, after the death of John A. Whitfield, W. W. Whitfield and Lucy A. Whitfield, instead of seeking a sale of the lands for the purpose of reinvestment of the proceeds, exercised their right of election, and took the lands, as was their right; that said W. W. and Lucy A. Whitfield took possession of the lands and rented and mortgaged them for loans of money, thus clearly expressing their right of election in kind to take the property itself as an investment; that they wanted to sell the land, but no one would buy it, because they could not make title, and they allowed it to be sold for taxes so as to get a semblance of title; that designedly and purposely the lands were permitted to be sold for taxes, and were purchased at the tax sale by W. W. Whitfield in the name of his wife, she having no knowledge of the sale and not furnishing any money to buy the lands; that, having this pretense of title, they sold it, and appellee, Thompson, bought that land in controversy under a deed made by the wife of W. W. Whitfield. The prayer of the bill was for the cancellation of this deed as a cloud on the title of complainants, and that the title be quieted and declared in complainants, and for rents.

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R. C. Beckett, J. J. McClellan, and *William Baldwin,* for appellants.

In construing any power granted by the will, we must look to the whole will in order to get the real intention of the testator, and we look to the final disposition made of the proceeds of the sale, in particular, to determine what the intention of the testator was as to whether there should be a sale before distribution or not; and if the disposition made by the testator of the proceeds of the property make it necessary that the property should be sold, then the power of sale is imperative, though the same may appear in the language of the granting clause of the will to be in the discretion of the executors. This very question has been before the courts repeatedly, and in all cases, so far as we have been able to find, the courts hold that, even though the language of the will would imply a discretion on the part of the executors as to the making of the sale, yet, if the final disposition of the proceeds requires a sale to be made before distribution, then the discretionary power applies only to the time when the sale should be made; but it will be considered that the sale must finally be made, and thus work conversion. *Wurtz* v. *Page,* 19 N. J. Eq., 365, 375.

"The doctrine of equitable conversion has its origin in the maxim of equity, that that is regarded as done which should be done. It is only an application of that maxim to a certain class of facts. The future duty is the present deed. The duty may arise also because a sale and conversion are indispensable to the execution of the testator's scheme. In such a case the main end includes all means necessary to its accomplishment. Whatever conflict there may be among the adjudications on this question in the application of the doctrine to the different state of facts, that conflict does not affect the doctrine itself." *Penfield* v. *Tower,* 1 N. D., 216–223.

"The direction may be expressed; it may be implied; it may necessarily result from the other provisions of the will because indispensable to their execution; and in the last case

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the conversion results on the principle that the testator must have intended that everything should be done essential to the execution of his scheme." *Penfield* v. *Tower, supra; Perot's Appeal,* 102 Pa. St., 235; see note, exceptions to the rule, *Ford* v. *Ford,* 5 Am. St. Rep., 144.

"Where a will contains a power of sale, not mandatory in terms, but it is apparent from the general scope and tenor of the will that the testator intended his realty to be sold, the power of sale should be held imperative, and the doctrine of equitable conversion applied." *Dodge* v. *Williams,* 46 Wis., 70-97; *Gould* v. *Taylor,* 46 Wis., 106; *Dodge* v. *Pound,* 23 N. Y., 69; *Craig* v. *Leslie,* 3 Wheat., 563; *Cook* v. *Cook,* 20 N. J., 373.

Mr. Whitfield had a very valuable estate, and he dealt with it in detail, and with very great care undertook to dispose of all of his property, impressing his will and intention as to how every piece of property he owned should be finally disposed of. When the court has determined what was the intention and purpose of the testator, it will so construe the will as to uphold and carry out the will and purpose of the testator, if the same is not in conflict with law. 4 Leading Cases in the American Law of Real Property, 35; 1 *Ib.,* 57, 58, 59; *Perkins* v. *Sank,* 81 Miss., 358, 362.

"In noting cases of the enlargement of devises without words of limitation, from life estates to fee simple, it is of course hardly necessary to say what has been, in effect, said over and over again, but perhaps never better than by the court in *Gulliver* v. *Poytz,* 3 Wilson, 141." "Cases on wills may guide us to general rules of construction; but unless the case cited be in every respect directly in point and agree in every circumstance, it will have little or no weight with the court, which always looks upon the intention of the testator as the polar star to direct it in the construction of wills." 1 Leading Cases on the American Law of Real Property, 59.

Applying the principles above set forth to the provisions of

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Mr. Whitfield's will, now under consideration, we find that we are not to be guided solely by the language used in the first part of item twelve of the will; it apparently leaves it to the discretion of the executors as to whether or not there shall be a sale; but we must look to the whole of clause twelve and other parts of the will to find the real intention of the testator. When we look to the disposition made by Mr. Whitfield of the proceeds of the property authorized to be sold in item twelve, we find that he provided that the same should be divided into two parts: One-half should be divided equally among three children, to be held by them absolutely; the other half of the proceeds, if not otherwise consumed, . . . "I direct my executors to invest, or so much of said other half as may be left in their hands unappropriated, in some active and productive property, of which each one of my said children is to have one-third, to be held under the limitations and conditions before set forth."

When we consider all the provisions of item twelve, together with the general scope and scheme of the whole will of William Whitfield, we can but reach the conclusion that it was the intention of the testator that these lands mentioned in item twelve should be sold by the executors and invested as directed in items twelve and thirteen of the will. If this was not done, the scheme and intention of the testator would not be carried out. If such was his intention, then there was an equitable conversion, and the title to these lands passed under the provisions of the will, which gave to the life tenants a life estate, with the remainder over to appellants. 7 Am. & Eng. Ency. Law (2d ed.), 465; *Wurtz* v. *Page, supra; Burr* v. *Simms,* 1 Whorton (Pa.), 252, 261.

J. G. Millsaps, and *A. F. Fox,* for appellees.

In reaching a determination of the matters at issue in this case several steps may be considered as fully established: That no special devise of the lands in question was made to any one;

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that the land in question was dealt with in the will by giving a power to the executors to sell; that pending the execution of this power the title vested and rested in the heirs at law. We do not understand the counsel for appellants to make any contention that this was not true; but, in any event, the matter is thoroughly settled by the courts (*Cohea* v. *Jemison,* 68 Miss., 510; *Jackson* v. *Burr,* 9 Johnson, 104; *Jackson* v. *Schauber,* 7 Cowan, 187; *Morse* v. *Bank,* 12 L. R. A., 62; 1 Williams on Executors, 549, 550, and note); that the power given to sell the residue lands was never exercised. This is set out in the bill of appellants.

These steps establish the legal title to the land in question in the heirs at law. Then the only question that occurs is: Did they hold it subject to any equities that might be worked out either by conversion or reconversion or subject to equities or trusts of any kind? If not, then the heirs at law held the absolute, legal, and equitable title, and the appellees holding through them have an unquestionable right both in law and in equity to the land.

The appellants' counsel contend that there is an equitable conversion in this case, but the will and the non-execution of the power that was given to the executors clearly do not present a case for the application of this doctrine. Equitable conversion has its origin in the maxim that "equity considers that as done which ought to be done." The foundation of the doctrine is in the duty that is imposed to sell at all events, and in the case at issue no imperative duty was placed by the testator on the executors to sell the residue land, and no conversion could therefore arise. The power given was purely discretionary. The testator left it to their judgment whether they would sell this land or not, subject to the restriction that it was not to be sold in two years. The power being discretionary, in default of its execution, no equity of any kind could arise in regard thereto, because the execution of discretionary powers cannot be

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interfered with by the courts. Tiedeman on Real Property, 554.

A case for equitable conversion can never arise where the power is discretionary. To hold otherwise would be to make for the testator a will he never meant. The sole use of conversion or reconversion in application to wills is to prevent the real will of the testator from being defeated.

To create a case for the application of the doctrine the direction of sale must be imperative, or it must be necessary to sell in order to carry out the manifest intention of the testator. Adams' Equity, 135; Bispham's Equity, 420–422; 2 Underhill on the Law of Wills, 957, *et seq.;* 3 Pom. Equity Jurisprudence, sec. 1160; *Ford* v. *Ford,* 5 Am. St. Rep., 141, and note reviewing the subject of conversion; 7 Am. & Eng. Ency. Law (2d ed.), 465–467, and numerous cases cited therein under note on p. 467; 9 Cyc., 831, 832, and numerous citations thereunder.

Our own court decided the question in *Montgomery* v. *Milliken,* 5 Smed. & M., 494.

Argued orally by *J. J. McClellan,* for appellants, and by *A. F. Fox,* and *J. G. Millsaps,* for appellees.

MAYES,* Special Judge, delivered the opinion of the court.

William Whitfield formerly owned a large estate in Lowndes county and in what is now Clay county. In 1854 he died, having executed a will, the proper construction of which gives rise to this litigation. The testator left two sons—John A. and William W.—and a daughter, Lucy Ann. The two sons were named as executors, and the will, after certain legacies of personalty, provided in its earlier items that certain designated lands and slaves should go to each of his three children for life (with cross-remainders in the event of death without living

*Chief Justice Whitfield, because of relationship to some of the parties to the suit, was disqualified and recused himself; Edward Mayes, Esq., a member of the supreme court bar, was appointed and presided in the case in his stead.

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issue) and with remainders over to the grandchildren. The testator owned several thousand acres of land which were not included in those specific devises, and which we shall designate as the "residue lands." John A. Whitfield and Lucy died without issue, and William W. conveyed those residue lands to various parties, executing warranty deeds purporting to convey estates in fee simple. He has now died, and his children claim as remaindermen. The question in this case, therefore, is whether under the will those residue lands passed to the testator's children for life, with remainders over to the grandchildren, or whether as to such lands the testator died intestate, and they passed by operation of law to the children in fee.

Before setting out the directly controlling provisions of the will, some of the earlier provisions should be noted. Items seven, eight, and nine, respectively, gave to Lucy, William, and John, each, certain described slaves and lands for life, with remainders over to the grandchildren, as stated above; and in item seven, which made the devise to Lucy, it was further provided that:

"If the plantation and land attached herein specially devised to the said Lucy Ann shall be materially less in value than the valuation of the lands and plantation hereinafter specially devised to the said John A., then I also devise to her a sufficient quantity of any other of my lands (not hereinafter specially devised to either of my sons) as will make her plantation and lands equal in value to those devised to my said son, John A., such land to be selected for her by my executors so as not to separate portions of a tract nor injure materially the value of my other lands adjoining."

Item eleven provided for a division of those slaves not specifically bequeathed in the preceding items, with certain prohibitions against the breaking up of families. Then came the directly controlling items, which are twelve, thirteen, and fifteen, and which are as follows:

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"Twelfth—I will and direct my executors after two years from my death they may sell, if deemed by them compatible with the interest of my children, the residue of all the lands and real estate I own, or may hereafter acquire, on such terms as they think best for my children. One-half of the proceeds of the sales is to be equally divided among my said children and paid to each of them in cash. And they are, respectively, to have and to hold the same absolutely. The other half of the proceeds of the sales, if not otherwise consumed and appropriated in equalizing the respective values of the lots of slaves bequeathed hereinbefore in items tenth and eleventh and in defraying the expenses of the execution of this will and in paying legacies, I direct my executors to invest, or so much of said other half as may be left in their hands unappropriated, in some active and profitable property, of which each of my said children is to have one-third, to be held under the limitations and conditions before set forth.

"Thirteenth—The residue of my personal property I direct my executors to sell, and the proceeds of the sale thereof, together with all my other property not before herein disposed of, I direct them to convert into money, and after defraying all the expenses necessarily incident to the execution of this my will, I hereby instruct said executors to invest in some profitable, valuable, and productive property, to divide the same into three equal parts, one of which I give to each of my said children, to be held by them subject to the limitations and conditions before created and set forth.

"Fifteenth—The property herein given, devised, and bequeathed to each of my children—except the special legacy to each one of five thousand dollars first to be provided for, the bequest of the mules to my son, John A., and the half of the proceeds of the sale of my lands directed in item twelve to be paid to them in cash—is given, devised, and bequeathed to each one for and during the term of his natural life, with remainders and limitations as before set forth. Nevertheless I hereby

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authorize my sons, if they desire or either one desires, to sell the real estate devised to him for the purpose of purchasing other lands or other productive property, or if either one desires to sell any refractory or unprofitable slave, or any slave it is necessary to his interest to sell for any special objection to the keeping of said slave, to sell the real estate for the reasons before given, and the title shall be good to the purchaser. The proceeds of this sale, however, are to be invested in other productive property and are to be held under the same limitations and conditions with the property so sold by them.

"And if my daughter, Lucy Ann, shall for the same reasons desire to sell any portion of the real estate or slaves herein devised and bequeathed to her, I authorize my said sons to sell such property for her, she to execute the conveyance to such as she desires to sell, and the proceeds of such sale or sales are to be invested by my said sons in valuable property and held by her under the same limitations and conditions with the property sold."

It does not appear that it ever became necessary for the executors to select any of the residue lands for the daughter under the seventh item of the will. It does appear that nothing was ever done by them under the twelfth clause. The power of sale thereby conferred was never exercised. It will be seen, therefore, that this case turns on a question of equitable conversion, as to which it was said in *Craig* v. *Leslie*, 3 Wheat., 563 (4 L. ed., 460): "The principle upon which the whole of this doctrine is founded is that a court of equity, regarding the substance, and not the mere forms and circumstances, of agreements and other instruments, considers things directed or agreed to be done as having been actually performed, where nothing has intervened which ought to prevent a performance. This qualification of the more concise and general rule that equity considers that to be done which is agreed to be done will comprehend the cases which come under the head of equity." In *Harrington* v. *Pier*, 105 Wis., 485 (82 N. W., 345; 50 L. R.

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A., 307; 76 Am. St. Rep., 924), a clear exposition of this doctrine is given as follows (italics ours): "The rule is that where there is *a positive* direction in a will to convert the real property into personalty, or there is a power of sale in a will and bequests of such character as to *plainly* indicate a testamentary intent that such power shall be executed to provide the means of satisfying them, *or* where the provisions of a will *cannot* be carried out *without* converting the realty into personalty, and the conditions are such that the testator *must* have contemplated that such conversion would take place to that end, courts of equity deal with the estate as personal property from the time the will takes effect."

The dispute in this case is not so much over the rules of testamentary construction, which govern it, as over the practical application of those rules in the special instance. All are agreed that the intention of the testator, once ascertained, controls, and that such intention is to be ascertained, not by a nice or hypercritical scrutiny of single provisions of the will, but by a broad study of the whole instrument. All agree that if the will, as a whole, clearly shows that the intention of the testator was that the residue lands should be sold at all events, any apparent discretion committed to the executors must be limited merely to the time or terms or other circumstances of the sale, and that by their omission to sell such manifested intention shall not be defeated, but that by operation of the equitable doctrine of conversion (or double conversion, in a case like this) the legal character of an estate for life, with remainder over to the grandchildren, will be impressed on these lands just as if they were lands which the executors had purchased with proceeds of the residue lands.

The true and final controversy, therefore, is this: Does the direction in item twelve, that the executors "shall sell, if deemed by them compatible with the interest of my children," invest the executors with a discretion to sell or not to sell, as they shall deem best, or does the will, taken as a whole, impose on

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them a mandatory direction to sell at all events and give them a discretion only as to the time and terms of the sale? The appellants, who claim to be remaindermen, contend, first, that such a mandatory direction to sell at all events is found in item twelve of the will, especially if reference be had to the whole will for evidence of the general intent of the testator. Clearly, there is no language in item twelve or in the will which expressly confers on the children any estate in the residue lands; neither is there any devise of those lands to the executors. The general rule is that a devise merely that lands may or shall be sold by the executors passes no interest or estate, but only a naked power. The language is: "I will and direct my executors after two years from my death they may sell, if deemed by them compatible with the interest of my children, the residue of all the lands and real estate I own, or may hereafter acquire, on such terms as they may think best for my children." It is settled law, by decisions in this state, as in others, that a testator may devise to his executor a power to sell lands in such manner as to confide to his purely personal discretion the decision whether a sale shall be made at all or not. The language which was held in *Montgomery* v. *Milliken,* 5 Smed. & M., 151 (43 Am. Dec., 507), to produce that result, was this: "The Mississippi property I wish to be sold by my executor at his own discretion." The terms employed in *Bartlett* v. *Sutherland,* 24 Miss., 395, were these: "My executors shall be at liberty at any and all times to sell or dispose of any part of my estate at private sale, if in their judgment it will promote the interest of my estate." In *Holland* v. *Cruft,* 3 Gray (Mass.), 162, the words used were: "I recommend to my executor that as soon after my decease as he shall think it expedient . . . he sell," etc. And in *Ford* v. *Ford,* 70 Wis., 19 (33 N. W., 188; 5 Am. St. Rep., 117), the will provided that the executors "shall" at their "discretion" sell and invest the proceeds. The language of this will is express that the executors "may sell if deemed by them compatible with the

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interest of my children"—that is, of all the children. So far as the terms are concerned in which the testator has embodied his intention in this carefully prepared testament, they are much similar to those employed in the cases above, and quite as clear. Indeed, it would be rather difficult concisely to refer the question of sale or no sale more directly to the judgment of the executors, and the determination by them that such sale is compatible with the interest of all the children is made a condition to any power to sell.

But it is said that such clearness of expression is only apparent; that, when the remainder of clause twelve is considered, a contrary intent is revealed, and that the discretion committed to the executors was given only as to time and terms of sale; that without such sale there could be, of course, no proceeds, and one-half of such proceeds could not be divided amongst the children in cash, to be held by them absolutely, nor could the other one-half be applied, so far as needed, to the equalization of bequests, etc., or any residue of such one-half be invested. Manifestly, there could be no proceeds to dispose of unless there was first a sale. But the defect in the argument is an assumption that clause twelve shows a positive intention of the testator that there shall be, at all events, a distribution and investment of such proceeds. The clause must be read as a whole. It consists of two sentences, each rhetorically complete; but there is between them a close connection in purpose. The first gives the power to sell; the second directs the disposition to be made of the proceeds. The first expressly declares that the sale may be made if deemed by the executors compatible with the interest of the children; and we do not find in the second any expressions or directions which seem to be designed to restrict or revoke the personal discretion thus plainly given to the executors or to produce that result by necessary implication. It seems to us quite clear that the intention of the testator in respect to the unproductive residue lands, as evidenced by this clause, was to permit them to descend to his heirs at law in

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fee, but to invest his two sons, his designated executors, with a discretionary power at any time after two years to determine whether it would not be compatible with the interest of all, including the daughter, to sell the lands and dispose of the proceeds as directed in the second sentence. There is no want of harmony between the two sentences. The second merely defines the ultimate question which the executors, under the personal discretion committed to them by the first, are to decide.

In the second place, it is urged by the appellants that, if clause twelve does not itself require the sale of those residue lands, and does, indeed, leave the sale of them discretionary with the executors, then, inasmuch as the executors never did sell, the whole of clause twelve lapsed by non-execution, became a nullity, and the lands are to be treated as if such power of sale had never been given. Wherefore, it is argued, such lands are included within the mandatory direction of clause thirteen, which clearly imposed the duty to sell and to invest under the limitations prescribed by the will the proceeds of "all my other property not before herein disposed of." In other words, it is argued that, since the will did not devise the residue lands to either the children or the executors, but the title descended to the heirs under the rule announced in *Cohea* v. *Jemison,* 68 Miss., 510 (10 South. Rep., 46), and since the executors did not exercise the discretionary power given them by clause twelve, then such lands were "property not before herein disposed of," within the purview of clause thirteen. This construction, however, we consider too narrow. It turns altogether on too technical a meaning attributed to the words "disposed of" as they were used by the testator. Those are not words of legal technicality, but are in general use. Even as defined in the cases, great variety and many shades of meaning have been assigned to them. See 9 Am. & Eng. Ency. Law, p. 540. Webster assigns to them certain meanings which immediately recommend themselves, because the reader recognizes at once that they clearly embody familiar and well-understood uses of the term. Amongst oth-

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ers he says: "To dispose of. (a) To determine the fate of; to exercise the power of control over; to fix the condition, application, employment, etc., of; to direct or assign for a use. (b) To exercise finally one's power of control over; to pass over into the control of some one else, as by selling," etc. It is true that clause twelve devised no interest in the residue lands to either children or executors, but the discretion which it did devise to the executors was a power at any time after two years to sell the same, pay each child one-half of his or her interest in cash, and invest the remainder in profit-paying property for life, with remainders over to grandchildren. Thus especially it was devised, in effect, that the fee of the daughter might be divested, and one-half of her interest be converted into a life estate, with remainders to her children, if any, without her consent. Certainly this was a material and serious dealing with the property, and we think that thereby the residue lands were "disposed of" within the true meaning of clause thirteen.

This conclusion is confirmed by considering the fact that the directions of clauses twelve and thirteen are so different that it is in the highest degree unlikely that the testator intended to apply both to the same property. For instance, clause twelve in effect forbade the selling of the residue lands until two years after the death, while clause thirteen in effect authorized the selling immediately of the property intended by it; and, again, under clause twelve, the executors, after the sale, were required to pay over one-half of the proceeds in cash, to be owned by the children absolutely, and were, in effect, forbidden to invest more than one-half in life estates with remainders, while by clause thirteen they were required to invest the entire proceeds in such estates. Whatever property the testator may have had in mind when he published clause thirteen, it seems quite evident that his intention did not include the same property about which he was at the same time making such inconsistent provisions as those in clause twelve. Nor can the fact that the executors never exercised the powers given to them by clause twelve affect the question. Their

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failure to act would not be allowed to defeat the ascertained intention of the will, it is true; but that failure cannot have operation to eliminate wholly from the will one of its clauses, and thereby to impart to the will a different meaning from what it would have if they had acted. The intention of the testator and the meaning of his will are determinable from the will itself, and not from the subsequent conduct of the executors.

Thirdly, it is claimed by the appellants that clause fifteen is important here. That clause provides that "the property herein given, devised, and bequeathed to each of my children, except" (certain items named), "and the half of the proceeds of the sale of my lands directed in item twelve to be paid them in cash, is given, bequeathed, and devised to each one for and during the term of his natural life, with remainders and limitations as before set forth;" and it is said that, if the twelfth clause does dispose of the residue lands, so that they are not included in the directions of clause thirteen, then the foregoing language of clause fifteen operates to fix on them the character of life estates with remainders as described. If this clause does so operate, it is necessarily because it either has a direct disposing effect as to those lands or has controlling value as evidence of the testator's intention in publishing clause twelve. A careful study of the entire clause convinces us that the testator did not intend by it to dispose of any of the property owned by him in either its original or any secondary form, but only intended to devise to his sons the right and power to sell the respective properties previously devised to them and to their sister in severalty for their respective lives, to convey the fee, and to reinvest the proceeds thereof on the same limitations as the property sold. It is merely a devise of powers of sale, and has no reference to the property disposed of by clauses twelve and thirteen; for neither of those clauses makes any devise of lands to the sons or the daughter, their direction being only that the proceeds of the sales, when made, should be invested in active and

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profitable "property"—which, of course, might have been bonds, stocks, or other productive personalty.

Nor do we consider the language of clause fifteen, relied on, as furnishing any evidence of an intention in the testator to direct a sale at all events of the residue lands. That language is merely a recital in brief of certain provisions of his will, made as an inducement to, and an explanation of, those other provisions immediately following, which contain the devises of powers of sale. The language employed does not appear to have been intended to control or influence any of the previous provisions; and while it speaks of "the half of the proceeds of the sale of my lands directed in item twelve to be paid them in cash," we find in this expression no inconsistency with the proposition that the sale of lands authorized by clause twelve was altogether discretionary with the executors. As we have already shown, the executors were only empowered to sell the lands at their discretion; but if the lands should be sold, they were then "directed" (that is, required) to pay over one-half of the proceeds in cash. And it was exactly correct, and not inconsistent, to speak of that provision as a direction, although the question of sale or no sale was still left to the discretion of the executors.

Regarding the will as a whole, and taking all of its provisions into view, we do not find in it any such clear evidence of intention on the part of the testator that the residue lands should be sold at all events as will overrule the express reference of the question of sale or no sale to the personal determination of the executors, and justify an application of the doctrine of equitable conversion. "Courts of equity do not incline to interfere to change the quality of the property as the testator or intestate has left it, unless there is some clear act or intention by which he has unequivocally fixed upon it throughout a definite character, either as money or land." *King* v. *King,* 13 R. I., 501. The rule is firmly established that, in order to work a conversion, there must be a clear and explicit direction in the will, the fulfillment of which necessitates the sale. While

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that direction need not be an express direction to sell, it must imperatively require something to be done which necessitates the sale. No such requirement exists in this will. Pom. Eq., sec. 1160, *et seq.;* 7 Am. & Eng. Ency. Law, p. 465.

Affirmed.

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ASA W. ALLEN *v.* WALLACE E. CAFFEE.

DEEDS. ***Warrant. Construction. Code*** **1892, §§ 2479, 2480.**

Under Code 1892, §§ 2479, 2480, giving a form of a deed, using the words, "I convey and warrant," etc., and providing that it shall be effectual to transfer right, title, claim, and possession, and that the word "warrant" in a deed shall constitute a covenant that the grantor will forever warrant and defend the title, the word "warrant" constitutes a warranty of the possession as well as of the title.

FROM the circuit court of Lee county.

HON. EUGENE O. SYKES, Judge.

Allen, the appellant, was plaintiff, and Caffee, the appellee, defendant in the court below. From a judgment only partly in plaintiff's favor he appealed to the supreme court.

The suit was to recover the balance due on the purchase money of a lot of land in the town of Verona, Mississippi. Caffee interposed a special plea to the declaration, setting up that Allen had made him a warranty deed to said property, by the terms of which he covenanted that he was seized of, and would deliver to him the possession of, the property, and that he had violated such covenant by refusing to deliver possession, and that, in order to get possession, he (Caffee) was forced to bring an action of unlawful entry and detainer against one Reifus, who was in possession under a contract of purchase from Allen made previous to the conveyance to Caffee; that in such pro-

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ceeding he employed counsel, and incurred other expenses incident thereto, and had lost some rents and the profits of a certain brick factory business established on the lot, and asked for a set-off to the amount of his expenses and damages. The court instructed the jury, for defendant, that, if Allen failed and refused to deliver possession to Caffee, it was a breach of the warranty in the deed, and Allen was liable to Caffee for the expenses of getting possession of the property and for any profits lost by him on account of not getting possession. The jury rendered a verdict for plaintiff, but allowing the sum of $125 as a set-off to plaintiff's demand, and judgment was entered accordingly.

Allen & Robins, for appellant.

The deed made by Allen, the plaintiff, to Caffee, the defendant, was an ordinary deed under our statute: "I convey and warrant." There was nothing else in the deed from which any covenant of any kind could be inferred. Now, what does "I convey and warrant" mean? The statute defines what it means. "Convey" is the granting clause, not a warranty at all, nor a covenant. It is made effectual by the statute (Code 1892, § 2479) to transfer all right, title, claim, and possession of the person making it, but it implies no covenant and no warranty. The word "warrant" is defined by Code 1892, § 2480, where it is said that "the word 'warrant' without restrictive words, in a conveyance, shall constitute a covenant by the grantor, that he and his heirs and personal representatives will warrant and defend the title of the property unto the grantee and his heirs, representatives, and assigns, against the claims of all persons whomsoever lawfully claiming the same." Now this is the only covenant in the deed in question; warrant is the only word that can be made to imply a covenant; and the statute says that the word "warrant" means to defend against the claims of all persons whomsoever lawfully claiming the same.

If some one does not lawfully claim the property granted,

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by title paramount to that of the grantor, there is no breach of this covenant. There must be a lawful claim or a lawful withholding in order to constitute a breach of this covenant. It is simply a covenant of title, nothing else; not a covenant of seizin, but a covenant of title—a covenant that the grantor will warrant and defend the title of the property, not that he will warrant and defend the seizin.

To take the view of this case taken by counsel for appellee and by the court below, that a covenant of seizin is implied in a conveyance under the statute, would upset the whole purpose of our statute making conveyance and transmutation of property easy. If such position be maintained, that paramount title or paramount holding is not necessary to constitute a breach of warranty of title, it would be dangerous for any owner of any storehouse or residence or farm in the state of Mississippi to sell and convey the same under our statutory deed without going to the property itself with the grantee and dispossessing every tenant and occupant of the same and turning over the actual manual property to the grantee. No man would dare sell a storehouse or a residence or a farm which he had rented, for fear the occupant might unlawfully and without grounds set up some false and fraudulent and unlawful title against the grantee, and then the grantor would be bound to defend the suits that would grow out of unlawful claims and compensate the grantee for any kind of forfeits that he might have made if the possession had been promptly delivered to him. The contention of appellee would make feoffment with seizin an easy process for conveying property compared to the conveyancing provided for by our statute.

This is not an open question in Mississippi, we see from the rulings of our court the question has been settled that there is no breach of warranty of title unless there is a paramount outstanding title or a holding under such a paramount outstanding title. We refer to the following decisions supporting this view: *Hoy* v. *Taliaferro,* 8 Smed. & M., 727; *Duncan* v.

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Lane, 8 Smed. & M., 744; *Heath* v. *Newman,* 11 Smed. & M., 201; *Dennis* v. *Heath,* 11 Smed. & M., 206; *Burrus* v. *Wilkinson,* 31 Miss., 537; *Kirkpatrick* v. *Miller,* 50 Miss., 521; *Witty* v. *Hightower,* 12 Smed. & M., 481; *Cassidy* v. *Jackson,* 45 Miss., 398; *Gunn* v. *Ervin,* 54 Miss., 451.

Anderson & Long, for appellee.

We do not controvert the proposition that under the laws of this state there is no breach of warranty of title unless there is a paramount outstanding title, or a holding under such paramount outstanding title. The cases cited by opposing counsel fully sustain that proposition. Counsel on the other side are talking about one thing, and we about another and very different thing. We contend that our statutory warranty deed is a covenant of seizin in the grantor—a covenant to deliver possession to the grantee—as well as a covenant to defend the title. We know of no Mississippi case in point. We do not think the cases cited in the brief of opposing counsel are in point. "The statutes of some of the states have prescribed a short form of warranty, which has been decided to contain in itself the five other covenants, including the covenant of seizin; so that whatever would constitute a breach of any one of the five covenants will give an action on the statutory covenant of warranty. As eviction is not necessary to a breach of the covenant of seizin, there may be a recovery on this statutory covenant before there has been an eviction." 8 Am. & Eng. Ency. Law (2d ed.), 100, 101, and cases there cited.

Code 1892, §§ 2479 and 2480, must be construed together. The former in part is in this language: "A conveyance of land may be in the following form, and shall be effectual to transfer all right, title, claim, and possession of the party making it, as can be done by any sort of conveyance," etc.

Now, what is warranted under this section? Our position is "all right, title, claim, and possession." Those are the covenants, according to our view, covered by "convey and warrant"

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in sec. 2480. For a discussion of this question, see 8 Am. & Eng. Ency. Law (2d ed.), 88, 91, 92, 93, 100, 101, 105, and cases cited in the notes.

A covenant of seizin is broken if the covenantor have not the possession at the time of his deed. *Fitzhugh* v. *Croghan,* 19 Am. Dec., 139.

The covenant of seizin does not pass with the land where the grantor was not seized. In such case the covenant is broken immediately. *Backus* v. *McCoy,* 3 Ohio, 211 (s.c., 17 Am. Dec., 585).

WHITFIELD, C. J., delivered the opinion of the court.

The chief question here for solution is whether the word "warrant," in Code 1892, § 2480, embraces a covenant of seizin. Section 2479 provides: "A conveyance of land may be in the following form, and shall be as effectual to transfer all the right, title, claim, and possession of the person making it as can be done by any sort of conveyance." This section must be construed in connection with sec. 2480, and, so construed, we think the word "warrant" warrants the possession or seizin as well as the title. Undoubtedly this was the purpose of the legislature. The object was to make some short form of conveyance which should embrace all the covenants known in common-law conveyancing. In 8 Am. & Eng. Ency. Law (2d ed.), pp. 100, 101, it is said: "The statutes of some of the states have prescribed a short form of warranty, which has been decided to contain in itself the five other covenants, including the covenant of seizin. So whatever would constitute a breach of any one of the five covenants will give an action on the statutory covenant of warranty. As eviction is not necessary to a breach of the covenant of seizin, there may be a recovery on this statutory covenant before there has been an eviction." See, also, same authority, p. 88 and other pages cited in brief of counsel for appellee. See particularly pp. 56 and 57. Whilst the statutes in some of the states on which

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the decisions referred to in this text are based are not identical, *ipsissimis verbis,* with our statute, some of them are substantially so, and we think it is clear that the same construction should be given our statute which has been given to some of those statutes most like our own. The manifest purpose of the lawmakers was to shorten the form of conveyancing and to use one word, "warrant," and to make that one word cover all five of the covenants usual in conveyances at common law—to wit, seizin, power to sell and convey, freedom from incumbrances, quiet enjoyment, and title. We have no livery of seizin now —a written deed takes the place of livery of seizin—and we think it more in harmony with the purpose of the legislature to construe secs. 2480 and 2479 as warranting seizin as well as title. If we had nothing but sec. 2480 to construe, counsel for appellant would be right on our statute, but sec. 2479 is necessarily to be construed together with sec. 2480, both directly relating to the same subject-matter; and we rest the case on the construction of the two, taken together. We conclude this opinion with a quotation from *Funk* v. *Creswell,* 5 Iowa, 68, which expresses our view of this subject: "There has been an evident disposition to encourage and promote greater simplicity in the forms of conveyances, not less in modern legislation than in the later judicial decisions. In England a system has grown into favor unknown to the common law. In the United States the covenant for further assurance, in favor in England, has gone into disuse; while the covenant of general warranty, unknown to English conveyancing, may be said to have been universally adopted as the main assurance of a perfect title. The legislature has provided in the code (sec. 1232) suitable forms for conveyances, in apt words—short, simple, and intelligible—free from the verbiage and formalities of the old system, but retaining all that was valuable or essential in meaning or substance. From these the form 'for a deed in fee, with warranty,' has been adopted by the present parties, with the covenant of warranty in the language of the statute. The form

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is not prescribed to be used by those who do not choose or prefer it; nor, having adopted it, are parties precluded from inserting other covenants of warranty, or from restraining, in express terms, those adopted, as they may desire. All that is claimed for it is that it shall have the very effect and meaning designed and understood by the parties and contemplated by the legislature—viz., to include and imply all the usual covenants in a deed of conveyance in fee simple."

Affirmed.

GULF & SHIP ISLAND RAILROAD COMPANY v. WIRT ADAMS, STATE REVENUE AGENT.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY v. WIRT ADAMS, STATE REVENUE AGENT.

TWO CASES.

1. RAILROAD COMMISSION. *Inferior tribunal. Code* 1892, § 90. *Certiorari.*
   The railroad commission is an inferior tribunal, within the meaning of Code 1892, § 90, providing that *certiorari* may be had to review the judgment of all tribunals inferior to the circuit court.

2. SAME. *Code* 1892, § 89.
   ***Certiorari* lies to correct mistaken findings of fact by the railroad commission induced by an error of law apparent on the record, the finding of a fact contrary to law, or the making of an order beyond its power, although Code 1892, § 89, confines the courts on *certiorari* to questions of law appearing on the face of the record and proceedings.**

3. SAME. *Privilege taxes. Railroads. Classification. Laws* 1898, *ch.* 5, *p.* 23, *sec.* 66.
   The provision of sec. 66, Laws 1898, ch. 5, p. 23, empowering the railroad commission, annually on the first Monday of August, to classify railroads for privilege taxes according to their charter exemption claims and gross earnings, if constitutional:

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Syllabus.

(a) Is prospective only and gives the commission no power to back classify; and

(b) The power conferred is judicial in its nature; hence

(c) Where certain railroads were classified for a number of years, without reference to charter exemptions from state supervision, they could not thereafter, for the purpose of privilege taxation for the same years, be back classified as railroads claiming exemption from state supervision.

4. SAME. *State revenue agent. Laws* 1894, *ch.* 34, *p.* 29, *secs.* 2–4.

The state revenue agent has no power, under Laws 1894, ch. 34, p. 29, secs. 2, 3, 4, to cause railroads to be back classified for the purpose of privilege taxation, since said sections refer to *ad valorem* taxation only, and the power of the railroad commission to back classify railroads for the purpose of privilege taxation cannot be inferred therefrom.

5. SAME. *Railroads. Per mile tax.*

A tax of a certain amount per mile on railroad franchises, without regard to varying conditions or values, is not a property tax, but a privilege tax proper.

6. SAME. *Ad valorem taxes. Code* 1892, § 3877.

Under Code 1892, § 3877, requiring the railroad assessors, in fixing assessments of railroads for *ad valorem* taxation, to take into consideration the value of their franchises, the value of the right of the companies to operate their railroads in the manner, on the conditions, and with the powers prescribed and granted in their several charters is meant.

7. SAME. *Assessment. Res adjudicata.*

Where the railroad assessors have assessed railroads for *ad valorem* taxes pursuant to Code 1892, § 3877, making it their duty to take the value of their franchises into consideration, and the taxes have been paid, the assessment is conclusive, in the absence of fraud; and hence, assuming that the privilege tax on railroads is a property tax, the railroads cannot be classified for the years in question, and made to pay the privilege tax which had not been assessed against them, fraud not being charged.

8. SAME. *Judicial notice.*

The court will take judicial notice that railroads were assessed and have paid *ad valorem* taxes for previous years, pursuant to Code 1892, § 3877, making it the duty of the railroad assessors, in fixing assessments of the roads, to take into consideration the value of their franchises.

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Gulf & Ship Island Case. From the circuit court of, first district, Hinds county.

HON. DAVID M. MILLER, Judge.

Yazoo & Mississippi Valley Case. From the chancery court of, first district, Hinds county.

HON. ROBERT B. MAYES, Chancellor.

Adams, state revenue agent, began the Gulf & Ship Island case by a petition to the Mississippi Railroad Commission asking that tribunal to reclassify or back classify the railroad company for the years 1898, 1899, 1900, 1901, and 1902 for the purpose of privilege taxation and to have the railroad company classified *nunc pro tunc* for each of said years as being, and as having been, liable to the $10 per mile additional privilege tax provided for in sec. 66, p. 23, ch. 5, Laws 1898, to be paid by railroads claiming exemption from state supervision under maximum and minimum provisions in their charters. The Gulf & Ship Island Railroad Company appeared before the railroad commission and filed a written statement of its case, showing cause, etc., and urged upon that tribunal the questions which were afterwards presented to the courts, and made of record all the facts upon which the questions arose. The railroad commission adjudged invalid all defenses, and rendered a judgment reclassifying and back classifying the railroad to the full extent prayed for by Adams, state revenue agent, in his petition. Thereupon the Gulf & Ship Island Railroad Company applied for and obtained a writ of *certiorari* to the Mississippi Railroad Commission, and carried the case into the circuit court. The circuit court, on final hearing, dismissed the writ and entered a judgment confirming the reclassification and back classification made by the railroad commission, and the Gulf & Ship Island Railroad Company appealed to the supreme court.

The Yazoo & Mississippi Valley case was begun by bill in equity, filed by Adams, state revenue agent, against that company. By an agreement between the parties it was stipulated that the question should be litigated in the chancery court

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whether the railroad commission had power to reclassify or back classify the railroad for privilege taxation, etc. From a decree in complainant's favor, overruling a demurrer to the bill of complaint, the defendant railroad company appealed to the supreme court.

The two cases were argued and submitted together, and were decided by the one opinion following.

[For the report of previous suits between the parties, based upon the same facts and demands, which went off for want of a classification under sec. 66, p. 23, Laws 1898, ch. 5, see *Gulf & Ship Island Railroad Company* v. *Adams,* and *Yazoo & Mississippi Valley Railroad Company* v. *Adams,* 83 Miss., 306.]

McWillie & Thompson, James H. Neville, and *E. J. Bowers,* for appellant, Gulf & Ship Island Railroad Company.

1. Does the writ of *certiorari* lie in this case?

That the railroad commission is a tribunal inferior to the circuit court within the meaning of Code 1892, § 90, cannot be doubted. It must be treated as inferior to the circuit court, else it would not be inferior to the supreme court of the state, because the latter has only appellate jurisdiction. The railroad commission is inferior to the circuit court or it is a supreme tribunal, one or the other. That it is not supreme, beyond the control of the judicial department of the government, has been manifested by a number of decisions of this court, some of them being rendered in cases in which the commission was a party to the litigation.

To deny the application of the writ will be, we respectfully submit, to deny the railroad, and all other railroads, the equal protection of the laws, contrary to the fourteenth amendment to the constitution of the United States, and we work it out this way:

By Code 1892, § 80, every taxpayer, except railroads, is given the right to an appeal from the "judgment as to the assessment of taxes" of the board of supervisors or the municipal au-

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thorities of a city, town, or village. This does not apply to railroads, because the board of supervisors and municipal authorities have nothing to do with railroad taxation.

The railroad commission is alone charged with the matter of the assessment of railroad property. No provision is made by law for an ordinary appeal from the judgments of the commission, but by Code 1892, § 90, a *certiorari* does lie. The railroads have no vested right to the same remedy given other taxpayers, but they have a right to some remedy where other taxpayers are given a way of relief. The difference between an appeal and a *certiorari* relates only to a mode of procedure. In one the trial is *de novo;* in the other, upon the record; and in order to make them equally efficient the party who must proceed by *certiorari* is compelled to make his defense appear of record in the inferior tribunal. This done, the one remedy is practically as efficient as the other, and the party who is driven to a *certiorari* has it in his power to make that remedy substantially the equal of an appeal, and hence cannot (perhaps) claim that he has been denied the equal protection of the laws. But if he be denied an appeal and also a *certiorari* (and no other remedy be given him), he has been denied the equal protection of the laws.

The legislature has not the power, had it attempted to do so (which it has not done), to grant a right to a review by the judiciary of an assessment made against all the taxpayers of the state except railroads and to deny that right to railroads. It could and has given the railroads a different mode of procedure to have assessments reviewed from that given other taxpayers, and of this no complaint is made.

In the case of *Yazoo & Mississippi Valley Railroad Company* v. *Adams, State Revenue Agent,* 77 Miss., 777, the supreme court of this state settled the matter. Read, beginning at the last paragraph on said page, down to the end of the page.

2. Is the agreed statement of facts a part of the record upon this *certiorari* proceeding?

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We think so, and for the following reasons:

(*a*) It was filed before the railroad commission *as a part of the record* before that tribunal. Of course every tribunal has control of its own record. It does not answer to say that the filing is the act of the clerk, and not of the commission, since the clerk is but the servant of the commission and acts for it.

(*b*) Our statute, Code 1892, § 89, regulating the "like proceedings" mentioned in sec. 90 of the code, expressly provides that on *certiorari* the reviewing court shall consider something more than the mere "record" of the inferior tribunal. The provision is: "And in any case so removed by *certiorari* the court shall be confined to the examination of questions of law arising or appearing on the facts of the record *and proceedings.*" If the reviewing court be confined to questions of law arising on the face of the record, as opposing counsel contend, then the words "*and proceedings*" are wholly meaningless. Some meaning must be given to them, according to a well-established canon of construction, if it can be reasonably done.

(*c*) The authorities hold that the question of the jurisdiction of an inferior tribunal is not determinable alone upon *certiorari* by the record proper, but jurisdictional facts may be inquired into outside of the record. 4 Ency. Pl. & Pr., 222, notes. The railroad commission being a tribunal of limited jurisdiction, its return to the writ should have contained the facts upon which it acted. *Marshman* v. *Todd,* 15 Ga., 25.

3. Has the state revenue agent power and authority in law to institute and prosecute this proceeding?

We submit that he has not. The revenue agent is an officer of the state, having only such powers as the legislature has seen fit to grant to him. His whole power and authority is derived from the statute, and is defined by the act of 1894, p. 29.

This proceeding is not a suit under sec. 2 of said act of 1894, for the recovery of past due and unpaid taxes due from appellant to the state. The litigation between the parties, decided

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by this court in appellant's favor, *Gulf & Ship Island Railroad Company* v. *Adams, State Revenue Agent,* 83 Miss., 306, was such a suit, and it failed for want of an assessment or classification. Under the decision of this court in the case of *State Revenue Agent* v. *Tonella,* 70 Miss., 701, such a suit cannot be maintained by the revenue agent in the absence of an assessment made by the assessor. Hence, a classification or assessment of the railroad for the additional privilege taxes sought to be collected in the preceding suit between the parties to this second suit being, as this court decided in said preceding suit, a condition precedent to the maintenance of a suit for such additional privilege tax, the exact question before us is not the power of the revenue agent to sue, but his power to compel an assessment or classification of appellant. Such power, we repeat, is not conferred by the second section of the act of 1894.

Is it conferred by the third section of said act? Manifestly not, since that whole section of the act relates to the assessment of property which the county or municipal assessors should have assessed and to proceedings before the county board of supervisors and the municipal authorities of cities, towns, and villages. County and municipal assessors, boards of supervisors, and municipal authorities have nothing to do with the assessment or classification of railroads. The appellee in this case recognized that they had no power in the premises and instituted his proceeding before the railroad commission; he does not pretend to be proceeding under either sec. 2 or 3 of the act of 1894.

This leaves only sec. 4 of said act to be considered.

The very first line of the section is notable. It provides: "*If the property* which the revenue agent discovers to have escaped taxation belongs to any railroad," etc. The whole section is manifestly limited in its operation to *property* of railroads which has escaped taxation. Clearly, therefore, the section does not warrant this proceeding, unless the additional privilege taxes in controversy be a tax upon property. Conceding for

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the sake of argument that the additional privilege tax sought to be collected is a property tax, and what result follows?

By sec. 112, Constitution 1890, taxation must be equal and uniform, and *property must be taxed in proportion to its value.* If, therefore, the tax involved be a property tax, this whole proceeding falls to the ground, since the property, whether it be the railroad track, the franchise, or any other property of appellant, can only be taxed according to value; and sec. 66, Laws 1898, p. 23, seeks to levy or impose the additional tax demanded without reference to value.

Appellee is at liberty to take either horn of the dilemma. If he stand upon the idea that the tax in controversy is a privilege, and not a property, tax, he has no power in the premises, and the railroad commission has none, under the act of 1894 (Laws 1894, p. 29), under sec. 4 or any other section of that act, and this whole proceeding is without warrant in law. If he claim that the tax in controversy is a property tax, then the act imposing it is void, since taxes on property must be laid in proportion to value. The tax involved is either a tax on property or it is not a tax on property, *one or the other.*

It is no answer to our proposition to say that the back assessment or classification was made by the railroad commission, and that it makes no difference at whose instance it was made, because the same reasoning applies with full force in negation of the power and authority of the railroad commission. So far as concerns back assessments or classifications of railroads, sec. 4 of the act of 1894, *supra,* defines and limits the power and authority of the railroad commission as well as of the state revenue agent. It only authorizes and empowers the commission to back assess *property.* The same dilemma is presented, with the same results, when we consider the act of 1894 (Laws 1894, p. 29), with reference to the power of the railroad commission as arises from its consideration touching the revenue agent's power. We will discuss the question of the power of the railroad commission in the next paragraph.

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4. Has the railroad commission power and authority to classify a railroad for privilege taxes at other times than the dates expressly named in sec. 66, Laws 1898, p. 23?

We have already seen in the discussion of the last preceding question that such power is not conferred by the act of 1894.

There is no other statute than the act of 1894 empowering the commission to back assess, and no statute authorizing it to classify railroads for privilege taxes except sec. 66, Laws 1898. By the very terms of that section the railroad commission is required to classify the railroads "annually *on or before* the first Monday in August." This is a grant of power, but it is equally a negation of power beyond the terms of the grant. Power is not given to classify *after* the first Monday in August even for the taxes of a current year, and certainly the section falls far short of authorizing a retroactive classification.

5. Has the railroad commission, after it has classified a railroad for privilege taxes under and at the time specified in sec. 66, Laws 1898, p. 23, and the state has collected taxes thereunder, power and authority afterwards to set aside its previous classification and reclassify the railroad, thereby imposing a greater burden on the road?

The law is settled, as between the parties to this case, that classification is and was a condition precedent to a right of action against a railroad for privilege taxes under said sec. 66, Laws 1898. *Gulf & Ship Island Railroad Co.* v. *Adams, State Revenue Agent,* 83 Miss., 306. In that case Chief Justice Whitfield, speaking for this court, said: "There is no escape from the conclusion . . . that the classification has to be made with reference as well to such charter exemption claims as to such gross earnings." The railroad commission did classify in each of the years the appellant's railroad, and determined it to have been a third-class railroad.

Under the very terms of the act of 1898, and under the construction thereof by this court in the preceding case between these parties, the commission could not have classified appellant

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in the years named without considering both "charter exemption claims" and "gross earnings."

Having classified the appellant, the commission must therefore be held to have done so, in the language of this court, "with reference as well to such charter exemption claims as to such gross earnings." It could not have classified otherwise. The previous classification, assuming the validity of the act, sec. 66, Laws 1898, must necessarily be held to have been an adjudication that appellant was not a railroad claiming exemption from supervision under maximum and minimum provisions in its charter. Whether this judgment was right or wrong is, in the absence of fraud, beside the mark. Right or wrong, it was wholly the work of the state, acting by its constituted authority, the railroad commission, and is *res adjudicata.* It cannot, after its rendition and the collection of taxes thereon, be vacated or amended.

[Counsel further argued the constitutionality of the statute, Laws 1898, ch. 5, p. 23, sec. 66, and contended that it was violative of both the state and national constitutions; but as the court did not pass upon the questions thus presented, a synopsis of that part of the brief is not given.]

Mayes & Longstreet, and *J. M. Dickinson,* for appellant, Yazoo & Mississippi Valley Railroad Company.

The first ground of demurrer to the bill presents the question whether the railroad commission can make a retroactive classification under this act of 1898 after the expiration of the current fiscal year so as to bring these companies liable to this additional ten dollars per mile privilege tax, when the companies have already been classified and have paid the ordinary privilege tax as each current year progressed.

We now maintain that unless the classification is made during the current year it cannot be made at all. The railroad commission, on a question of privilege taxation, is without any authority in the law to make a classification which shall operate retro-

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spectively. This classification was made in 1904, and under it this attempt is made to collect back privilege taxes when the years have long since expired in and for which the liability for those privilege taxes is sought to be imposed.

It is axiomatic in the law of taxation that the assessing body or tax-imposing body, whatever its name may be, must proceed under and by virtue of a statute; and if there is no such statute, then no tax can be imposed. It is hardly necessary to cite authority for that proposition, but if it were, the *Colonial Mortgage Co.* v. *Adams,* 82 Miss., 263, is enough.

This is not a question of legislative power, but one of authority of the railroad commission, which is a mere ministerial board; it is not a question of what the legislature might have authorized to be done, but only one of what the legislature has authorized to be done.

Now there is authority in the code and in the statute of 1894 fixing the powers of the state revenue agent for the making of back assessments on property for *ad valorem* taxes, but those powers are confined to the making of back assessments in that particular class of cases.

A back assessment of privilege taxes, on a retrospective classification for purposes of privilege taxation, is a thing wholly unknown to our laws. There is no statute which even squints at any authority conferred for such purpose. It is elementary that not only must there be statutory authority, but such authority as is given by the legislature must be followed with the utmost exactitude. 1 Cooley on Taxation, pp. 598, 604.

The act of 1898, which alone authorizes the classification in question, expressly declares that the railroad commission shall annually, on or before the first Monday in August, classify the several railroads; and it is perfectly manifest that the legislature provided that this annual classification is to be made on or before the first Monday in August for each current year. There is no provision whatever that it afterwards may be made, and we contend that it cannot be done.

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The foregoing observations are all the more forcible when it is remembered that the operation of a privilege tax statute is highly penal. All contracts are made void if the privilege tax is not paid, and the delinquent is liable to indictment; and it, we think, was never the intention of the legislature that under this group of statutes there should be such a thing as the fixation of a retrospective liability. During the current year the railroad commission had the power (leaving out of view the other points in the case for the present) to make such classification and call upon the railroad company to pay this privilege tax, but it did not do so, but allowed the fiscal year to expire. Not having done so, the railroad company is not delinquent; it never was liable; and it cannot now be put in the attitude of delinquency because the railroad commission may see proper to undertake at this late day to make a classification with retrospective aspect.

Another ground of demurrer is as follows: "Because the said bill does not aver that this defendant, in and during the years therein respectively named, was under and because of the provision of said sec. 6 (of this defendant's charter) lawfully entitled to the exemption from the power and jurisdiction of said commission set forth in said bill."

The court below should have sustained this ground of demurrer for the following reasons:

The bill did not allege that in the years mentioned the railroad company was lawfully entitled to the immunity or exemption from supervision. Obviously the statute does not contemplate that railroad companies are to be fined for merely having claimed an exemption to which they were not entitled. So heavy an imposition is not allowed on a mere pretense or shadow. When the statute says that the ten dollars additional privilege tax is to be imposed "on each railroad claiming exemption," etc., it is to be read as if it ran in this wise: "On each railroad having an exemption and asserting the same." It takes the double event to make the company liable for the tax. It must both have it

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and assert it. It was never intended to fine the railroad company for having an exemption clause in its charter which it would be lawfully entitled to assert if it saw proper so to do; nor, on the other hand, was it intended to fine the railroad company for making an unfounded claim that would not amount to anything before the courts, and where all that the commission would have to do to overturn the claim would be simply to disregard it.

To put the point a little differently: The additional tax is and must be considered to have been laid upon an available asset or value enjoyed by the railroad company, to be laid upon something which is practically a fairly substantial basis of a value for taxation—just as in our constitution it is provided that the increased values of railroad property may be assessed for taxes where the charter runs for a longer period than ninety-nine years, as is done in sec. 178.

It was never intended that the state should be pursuing the railroad company on duplicated and inconsistent demands. It was never intended that the railroad commission, being one agency of the state working in one office, should insist that the company was subject to its supervisory jurisdiction in the matter of rates, and should be imposing rates upon it, or undertaking to do so, and that at the same time the state revenue agent, another agent of the state, working in a different office, should be demanding taxes because the company is, or claims to be, not subject to supervision. Common fairness and justice requires that the state should plant itself somewhere, and assume a single and consistent position in regard to this matter.

When the state revenue agent, therefore, sues the company and demands additional privilege taxes as for a railroad claiming exemption, it must be taken that the demand is based upon a recognition of the fact that there is an exemption which may be claimed; and the state's bill, filed by the revenue agent, should so allege.

Another ground of demurrer is as follows: "The said bill does

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not show or allege that in or during the years therein respectively named the said railroad commission fixed or determined any rates to be charged by this defendant upon that class of persons or things named in said sec. 6 (of this defendant's charter), which rates the said defendant refused to put in force and observe; nor does said bill show or aver that the said railroad commission during any of said years was deterred from fixing and determining any such rates to be charged by this defendant by and because of the claim of this defendant that it was exempt by said sec. 6 of its charter from the power and jurisdiction of said commission as set forth in said bill."

The bill did not allege that the railroad commission fixed any rates of freights or passenger fares which the company refused to observe or that the commission was deterred from fixing such rates because of any claim of exemption advanced by the defendant. It is true that the bill says that the defendant claimed an exemption, but it does not say that this claim amounted to anything more than a mere theoretical assertion of an abstract right; it does not show that such claim produced any practical results whatever, either on the action of the railroad commission or in regard to the obedience or non-obedience by the defendant of any order promulgated by the commission in regard to rates. We submit that the bill, in order to have been good, should show those facts.

Under this statute it takes the double event to make the company liable for the additional privilege tax. The company must both have the right and it must assert it. It was never intended to fine the company for having an exemption clause in its charter which it would be lawful to assert if it saw proper so to do and for making of a mere abstract claim of its right so to assert it if it should see proper so to do, while at the same time submitting to the orders and suggestions of the railroad commission.

To put it a little differently: In order to render the company liable the company must have a right which it practically as-

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serts and which it interposes as a barrier between it and the state, to prevent the state, through its appointed agency, the railroad commission, from working its will in the fixation of the company's rates. A mere abstract or academic right is not the thing intended to be taxed, and it is not intended to tax a mere protest, designed, and designed only, to keep straight a record of a right and to exclude the inference of a waiver by acquiescence.

[Counsel also argued the constitutionality of the statute, sec. 66, Laws 1898, p. 23, contending that it violated the state and national constitutions; but a synopsis of that part of the brief is not given, since the court did not pass upon the question.]

Green & Green, for appellee, in both cases.

1. The power existed in the railroad commission to back tax, classify, or assess, under ch. 34, Acts 1894, the additional privilege tax of ten dollars per mile on the railroad of appellant, claiming exemption from supervision by reason of the maximum and minimum provisions of its charter as to rates.

The commission exercised this power, and, upon notice, made the back-tax classification complained of. There is no dispute but that appellant claimed the exemption and enjoyed the privilege taxed, and the sole question is whether, after having enjoyed the privilege, the revenue legislation is so defective as to preclude the enforcement of the tax thereon.

On the former appeal it was held that a classification was necessary; and if there existed no power to make such classification, this court would have so declared, and not have treated the power as existing and as requiring exercise before liability could accrue. *Gulf & S. I. R. Co.* v. *Adams,* 83 Miss., 306 (s.c., 36 South. Rep., 144). The scope of the remedial legislation covered by ch. 34, Acts 1894, is stated in the broadest terms in the appointment of the state revenue agent with "power and . . . duty to proceed by suit in the proper court against all . . . persons, corporations, companies, and associations of per-

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sons for all past due and unpaid taxes of any kind whatever." Sec. 2. "Taxes of any kind whatever," due by persons or corporations, includes every kind of tax, privilege and *ad valorem.* This ch. 34 was enacted to remedy the declaration in *Tonella* v. *Adams,* 70 Miss., 702, that sec. 4192 of the code was unconstitutional, and to distribute among the proper constitutional revenue officers the powers of assessment conferred by sec. 4192 upon the revenue agent. In sec. 4192 these powers, so generalized in ch. 34, are made specific, and therein it is declared that "it is the duty of the state revenue agent, when any person, corporation, property, business, occupation, or calling, liable to an *ad valorem* or privilege tax, has escaped or shall escape taxation by reason of not being assessed, or of not being demanded, or otherwise, to *assess* the same," etc.

"Assess" is here applied to both privilege and *ad valorem* taxes. By Code 1892, § 3379, the commission was to "classify" railroads for privileges taxes, and "classify" and "assess" have thus the same contemporaneous construction, and this legislative construction was in force when ch. 34, Acts 1894, was passed. Sec. 3, ch. 34, following the broad scope of sec. 2, in amending sec. 4192 of the code, provides that when the revenue agent discovers that "any person, corporation, property, business, occupation, or calling has escaped taxation by reason of not being assessed," he shall give notice to the tax collector, who shall make "the proper assessment" and give notice to the "person or corporation whose property is assessed." "Business," "occupation," "calling"—all are subjects of privilege, and not *ad valorem,* taxes.

The legislature would hardly impose a privilege tax and provide a comprehensive scheme for collecting "all past due and unpaid taxes of any kind whatever," and specifically provide for the back taxes on any "business," "occupation," or "calling" being collected, and not provide for its execution. The word "assess" in sec. 3 means to take such steps, under the law, as to subject the "property," "occupation," or "call-

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ing" to taxation by such procedure as is provided for its assessment or classification. *People* v. *Commissioners,* 174 N. Y., 431. The word *"property,"* in "whose *property* is assessed" in sec. 3, means both the occupation and calling—*i. e.,* privilege taxes and property taxes proper.

Section 3 provides for the classes of assessments to be made by the tax collectors of counties and municipalities, to be approved by boards of supervisors or of aldermen. Railroads were to be assessed, under sec. 112 of the constitution, by the railroad commission. So, after dealing with the general assessment of "occupations," "callings," "property," etc., by sec. 3, ch. 34, sec. 4 deals with railroads and their subjection to "all past due and unpaid taxes whatever." Having used "property" in sec. 3 as synonymous with "occupations" or "callings," in sec. 4 it uses this generic term in providing for the back taxation of railroads. The legislative intent was that all back taxes "of every kind whatever" were to be collected, and were embraced within the machinery provided therefor. So in interpreting sec. 4, as was done in *Railroad* v. *Adams,* 73 Miss., 648, this legislative purpose must be given effect. "Property" and "assessed" in sec. 4 should therefore be interpreted as embracing *privilege* taxes and as meaning *classification* therefor. *Woodruff* v. *Parham,* 8 Wall., 131. The statute, being remedial and in aid of revenue, has been uniformly construed liberally, and to give effect to the requirement that the burdens of taxation should be borne equally. Speaking of this legislation, it is said in *Railroad* v. *Adams,* 71 Miss., 752: "But it also shows that the legislative purpose was that all property of all descriptions which had escaped taxation . . . should be subjected to taxation."

Even if construed strictly, the *franchise* enjoyed is taxable as "property." *Coulson* v. *Harris,* 43 Miss., 728; *Reed* v. *Beall,* 42 Miss., 472; *Portwood* v. *Baskett,* 64 Miss., 216; *Railroad* v. *Heines,* 183 U. S., 66; *People* v. *Commissioners,* 174 N. Y., 431.

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To restrict sec. 4 to *ad valorem* taxation would defeat the express purpose of the legislature, and, by strict construction, create an invidious exemption in favor of railroad privilege taxation, contrary to its requirements as to all other persons and corporations. Seeking by the broadest terms to enforce all back taxes, *ad valorem* and privilege, the legislature would, in veiled language, create an exemption in favor of railroads as to privilege taxes.

"Invidious exemptions are not favored, nor ought they to be, as they are in principle utterly opposed to the rule of equality, which ought always to prevail in imposing public burdens." *Railroad* v. *Philadelphia,* 101 U. S., 537.

As said in *Railroad* v. *Adams,* 73 Miss., 661: "The insuperable obstacle to this construction of the statute is that we are confronted at every step with a contrary legislative purpose."

2. The commission found that the appellant had escaped taxation on this franchise by reason of not being assessed, and there is no contention that this tax has been paid. The classification into first, second, third, and narrow-gauge railroads under the statute did not embrace this additional tax of $10 per mile as claiming the exemption. Notwithstanding the classification in first, second, third, and narrow-gauge classes, it was held in the former appeal that classification by reason of charter exemption claims was necessary. If the classification into first, second, and third-class railroads necessarily included, as by adjudication, the classification for the additional privilege tax by reason of claims of charter exemption, then on the former appeal the court would have held that the classification into the former classes necessarily included a classification into the latter, and that, therefore, there had been in legal contemplation, though not in fact, a classification according to said charter exemption claims. But the court adjudged that there had been no classification according to charter exemption claims, and reversed the case solely for this reason.

The classification into first, second, third, and narrow-gauge

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railroads under sec. 66, ch. 5, Acts 1898, was not an adjudication of the claim for the additional privilege tax of $10 on railroads claiming exemption under their charters.

To constitute *res adjudicata* the question must be raised by the pleadings. *Hubbard* v. *Flynt,* 58 Miss., 270; *Davis* v. *Davis,* 65 *Id.,* 498; *Lorance* v. *Platt,* 67 *Id.,* 190.

In *Meacham* v. *Pinson,* 60 Miss., 217, there was a general decree in a suit upon a note promising to pay principal, interest, and attorneys' fees, in which no evidence as to attorneys' fees was adduced, and in this subsequent suit recovery was had. In *Dunlap* v. *Edwards,* 29 Miss., 43, it was held: "In order to give such effect to a former judgment, it is necessary not only that the action should be founded on the same cause of action embraced in the former suit, but that the cause of action in the second suit was embraced in the judgment rendered in the former action, . . . and it is well settled that it was competent to show that the cause of action of the second suit was not embraced in the former judgment."

The former classification as a third-class railroad was incomplete as a classification upon which to base the additional privilege tax of $10 per mile, as, concededly, the commission did not consider nor adjudge the charter exemption claim in making it, and in this judgment finds as a fact that the franchise has escaped taxation by reason of not having been included in the former judgment.

3. Section 66, ch. 5, Acts 1898, imposes a privilege tax on the franchise, and does not violate sec. 112 of the constitution.

Prior to *Adams* v. *Miss. L. Co.,* 84 Miss., 23 (s.c., 36 South. Rep., 86), wherein the opinion of a majority of the court held the *proviso* to sec. 8, Acts 1900, p. 44, rendered that section unconstitutional, our court had never held, if it can be so interpreted as so holding there, that the uniformity and equality clause of the constitution applied to privilege taxation. In *Holberg* v. *Macon,* 55 Miss., 114, 115, the intimation was to the contrary, and that in any event "all that is necessary in

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levying them is that all persons pursuing the same occupation shall be taxed the same amount, or in the same ratio." The great weight of authority holds this view. 21 Am. & Eng. Ency. Law (2d ed.), 802. The *ad valorem* basis of taxation does not apply to privilege taxation. *Id.*, 805. *Adams* v. *Lumber Co.*, *supra*, did not involve railroad taxation, and the court found no fault with the levy of a specific tax of $25 for each 500 acres, regardless of value or location.

By sec. 66 all railroads of the same class must pay the same amount of privilege tax, and so the taxation is equal and uniform upon all in the same class.

The amount of this privilege tax was fixed by the legislature, and it found as a fact that this exemption claim as a franchise should pay $10 per mile. There is no attack upon the reasonableness of the amount. Every presumption is invoked to support this legislative finding. *Erb* v. *Morach*, 177 U. S., 586. In *Coulson* v. *Harris*, 43 Miss., 737, 738, it was held that a "license is a franchise, and a franchise is recognized by the best authority as property, and is therefore the subject of taxation," and a specific privilege tax of $100 by the legislature upon a license was held valid. *Reed* v. *Beall*, *supra*; *Portwood* v. *Basket*, *supra*.

4. This proceeding against the Gulf & Ship Island Railroad Company to back-tax classify is not the splitting up of a cause of action.

Appellant was liable to two separate, distinct privilege taxes—the one, as a third-class railroad; the other, as a railroad claiming exemption from supervision. These two liabilities are not items in a running account, nor are they interdependent. The Gulf & Ship Island Railroad Company may be a third-class road, and be so assessed or classified, and may owe the privilege tax thereon; but whether it is a railroad, of whatever class, claiming exemption from supervision, is not determinable nor determined by its being a railroad of the third or any other class. The court on the former appeal held that the commis-

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sion must classify into first, second, third, etc., classes according to gross earnings, and then must also classify according to charter exemption claims. Upon the former there must be paid $20, $15, $10, or $2 per mile as the privilege tax on a railroad of first, second, third, or narrow-gauge class; upon the latter, no matter to which of said classes it belongs, an additional privilege tax of $10 per mile must be paid by each railroad claiming the exemption from supervision. If a classification as a first, second, etc., class road and for charter exemption claims must be made *uno flatu*, as it is admitted that in fact the classification made did not embrace that of charter exemption claims, it would be the former classification that would be invalid, and not the present one, which reaffirms the previous classification into second and third classes, and now adds the classification by reason of charter exemption claims.

The same evidence would not support recovery upon the two causes of action. Payment of the one could be, and was, made without payment of the other. The clauses of the statute to be counted on are distinct. Suit for the privilege tax on a second or third-class railroad, as was done, could be maintained without reference to the classification for charter exemption claims or of a privilege tax due therefor. As said in *Wilkinson* v. *Telegraph Co.*, 68 Miss., 6: "The $25 provided by the act cited is not a part of an entire demand, but it is a separate and distinct thing, for which one entitled may sue and recover, without suing for anything else, and such recovery is not a bar to another action for a distinct thing." See also *Armfield* v. *Nash*, 31 Miss., 361; *Drysdale* v. *Canning Co.*, 67 Miss., 534; *McLendon* v. *Pass*, 66 Miss., 111; *Williams* v. *Luckett*, 77 Miss., 397; 14 Am. & Eng. Ency. Law, 798; *Wilkinson* v. *Black*, 80 Ala., 329.

It is admitted that this additional privilege tax was not sued for, nor recovered, nor paid. If taxes admittedly due could be paid by the easy legal fiction of *res adjudicata*, every evasive taxpayer could have himself sued for his full tax, and pay the

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judgment, and then claim payment of all *ad valorem* or privilege taxes, under the principle that all taxes claimed should have been sued for in one suit, and as this was not done, the judgment was *res adjudicata.*

Argued orally by *R. H. Thompson,* for appellant, Gulf & Ship Island Railroad Company; by *Edward Mayes,* for appellant, Yazoo & Mississippi Valley Railroad Company; and by *Marcellus Green,* and *Garner W. Green,* for appellee.

Cox,* J., delivered the opinion of the court.

The first of the above-styled cases is here on appeal from a judgment of the circuit court of Hinds county, the case having been tried there on *certiorari* to the State Railroad Commission as assessors of railroads. The purpose of the writ was to bring before the court the record and proceedings of the commission in back-tax assessing and classifying the Gulf & Ship Island Railroad Company for each of the five years from March 1, 1898, to March 1, 1903, and to have judicially ascertained whether the commission had not transcended its powers in back-tax assessing and classifying the said railroad, and classifying it as a road claiming exemption from state supervision under maximum and minimum provisions in its charter, and assessing and classifying it for the payment of the privilege tax of $10 per mile for each of the years named, in addition to the privilege tax paid by it during each of said years as a railroad of the third class. The circuit court affirmed the judgment of the commission, and ordered a writ of *procedendo* to be issued.

The second of the said cases is here on appeal from the chancery court of Hinds county. It was heard and decided on demurrer interposed by the Yazoo & Mississippi Valley Railroad Company, appellant here and defendant below, to a bill filed by Wirt Adams, state revenue agent, in which complainant set

*Judge Calhoon, owing to illness, was off the bench when this case was argued, submitted, and decided. W. M. Cox, Esq., a member of the supreme court bar, was duly appointed, and presided not only in this case, but generally in the absence of Judge Calhoon.

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up the order of the railroad commission of July 18, 1904, which found that the said railroad company had escaped taxation on its railroad for an additional privilege tax of $10 per mile for each of the years from March 1, 1898, to March 1, 1903, by reason of not having been assessed and classified as a railroad claiming exemption from state supervision under maximum and minimum provisions of its charter, and ordered and adjudged that the objections of said railroad company be overruled; that the classification of said railroad under sec. 66, ch. 5, p. 23, Acts 1898, into first, second, and third classes, according to its parts, made during each of said years (the privilege tax for such first, second, and third classes for such years having been paid), be confirmed; and that said railroad company and railroad be back assessed and classified, as a railroad claiming exemption from state supervision under maximum and minimum provisions in the charter for the said years, for the payment of the additional privilege tax of $10 per mile for each of said years on each mile of its railroad in the state. The bill prayed for a decree for $42,187.40 against said railroad company, with interest; that a lien be decreed for same against the property of said company; and, if said sum should not be promptly paid, that the property of the said company be sold to pay the amount so decreed to be due for said unpaid privilege taxes. The demurrer was overruled and decree entered for appellee.

In the consideration of the first case we are confronted *in limine* with the contention that the court upon *certiorari* cannot review the finding of fact by the commission, because the statute creating the remedy by *certiorari* (Code 1892, § § 89, 90) declares that the court shall be confined to the examination of questions of law arising or appearing on the face of the record and proceedings, and because the statute gives the commission no authority to sign a bill of exceptions, and, in fact, no bill of exceptions was taken. The reasons assigned may be conceded, but the conclusion does not follow. *Certiorari* is

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the great corrective writ by which the superior courts exercise a supervisory power over inferior courts, tribunals, and boards which exercise judicial functions, and by which their records and proceedings are brought under review, to the end that all abuses of power may be corrected and that they may be held strictly to the jurisdiction marked out for them and prevented from transcending the powers by law conferred upon them. 4 Ency. Pl. & Pr., 10. The state railroad commission is an inferior tribunal within the contemplation of sec. 90 of the code, and is subject to the supervision and control of the superior courts of the state through the writ of *certiorari*. *Railroad* v. *Adams,* 77 Miss., 777 (25 South. Rep., 355).

A mere mistake of fact by the commission will not be corrected by *certiorari;* but a mistaken finding of fact induced by an error of law apparent upon the record, the finding of a fact contrary to law, or the making of an order beyond the cognizance and power of the commission, can and will be corrected by the superior courts, in the exercise of their supervisory and corrective power, through the writ of *certiorari*. It is the peculiar province of the writ of *certiorari* to correct errors of law apparent upon admitted or established facts. 4 Ency. Pl. & Pr., 11. It has been held by this court that evidence may be heard in the circuit court in order to make manifest error of law committed by the inferior tribunal. *Robinson* v. *Mhoon,* 68 Miss., 712 (9 South. Rep., 887).

The remaining questions passed upon in this opinion, and upon which the decision turns, are common to both cases. They will therefore be considered and decided together. It is contended by appellants that the railroad commission was without power or authority to back classify these railroads under sec. 66, ch. 5, p. 23, Acts 1898, and classify them as railroads of the third class, and of the first, second, and third classes, respectively, claiming exemption from state supervision under maximum and minimum provisions in their charters. That without such classification the appellants were not liable for the

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additional privilege tax of $10 per mile was expressly adjudicated by this court in *Gulf & Ship Island Railroad Co.* v. *Adams*, and *Yazoo & Mississippi Valley Railroad Company* v. *Adams*, 83 Miss., 306 (36 South. Rep., 144). It was also determined in those cases that the said railroads had not been classified as railroads of the first, second, and third class or narrow gauge, claiming exemption from supervision, and that because of the want of such classification they were not liable for the additional privilege tax of $10 per mile as railroads claiming exemption from supervision. The railroad commission, upon demand of the revenue agent, having, since the above decision was rendered, reclassified the said railroads and classified them as railroads of the third class, and of the first, second, and third classes, respectively, claiming exemption from state supervision, it becomes highly important to determine whether the railroad commission, having once classified said railroads under sec. 66, ch. 5, p. 23, Acts 1898, for the years for which the additional privilege tax is sought to be collected, could afterwards reclassify them for the said years and assign them to different classes than the ones to which they had previously been assigned. If the commission had authority to back-classify these railroads at all, the power must be found in some statute. If not found in sec. 66, ch. 5, p. 23, Acts 1898, or in ch. 34, p. 29, Acts 1894, which prescribe the duties and powers of the state revenue agent, it did not exist, as these are the only statutes from which the power could by any possibility be inferred. Section 66, ch. 5, p. 23, Acts 1898, is prospective, and prospective only. It provides that "the railroad commission shall annually, on or before the first Monday in August, classify the several railroads according to such charter exemption claims and the gross earnings of each," etc. The power therein given must be exercised annually on or before the first Monday in August. If not exercised by that date of any year, the power given by that section for that year must fail by the very terms of the statute.

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It is contended for appellee, in a most ingenious and forceful argument, that all the power needed to enable the commission to make the back classification is to be inferred from the powers conferred upon the state revenue agent by ch. 34, p. 29, Acts 1894. It may be conceded that, if this statute empowers the state revenue agent to have railroads back classified for purpose of privilege taxation, it also empowers the railroad commission to make the back classification. *Railroad Company* v. *Adams*, 73 Miss., 661 (19 South. Rep., 91).

It therefore becomes necessary to analyze and construe ch. 34, p. 29, Acts 1894, in order to determine whether the power contended for is thereby given, either in express terms or by necessary implication. If given by this act at all, it must be found in either sec. 2, sec. 3, or sec. 4. It cannot be found in sec. 2. The purpose and entire scope of this section is to arm the revenue agent with power to sue for all moneys due the state, or any county, municipality, or levee board, for any cause whatever, and especially for all past due and unpaid taxes whatever. The right of the revenue agent to sue is not the thing controverted here, but the right of the railroad commission to do an act which is an indispensable prerequisite to a suit by him. The latter is not to be inferred from the mere giving in general terms to the revenue agent of the right to sue for all past due and unpaid taxes. The power to back classify railroads for privilege taxes is clearly not to be inferred from sec. 3 of the act, for that applies only to back assessments by the tax collector and the boards of supervisors of the several counties. If the power exists at all, it must be found in sec. 4, p. 30, which reads as follows: "If the property which the revenue agent discovers to have escaped taxation shall belong to any railroad or other corporation which, under the law, is required to be assessed by the state railroad assessors, the revenue agent shall give the notice required herein to said railroad assessors, and they shall give the required notice to the company or corporation. At their next meeting, after giving

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the proper notice, said property shall be assessed in the same manner required by law and placed on the proper county, municipal, or levee board roll, and collected by the proper officers in the manner required by law, and the revenue agent shall have his compensation as in other cases." On its face this section applies to back assessment of property for *ad valorem* taxation, and cannot, unless it be by inference, be held to apply to back classification for imposition of privilege taxes.

It is contended for appellee that it is the evident purpose of the statute to make the powers of the railroad assessors for back assessment as extensive as the powers for back assessment conferred on the collectors and board of supervisors by sec. 3, and that the use of the words, "should the revenue agent discover that any person, corporation, property, business, occupation, or calling has escaped taxation by reason of not being assessed, it shall be his duty to give notice," etc., indicates that the power is given to the tax collector and board of supervisors to back assess or back classify for privilege taxes. We cannot adopt this construction. It is evident, notwithstanding the general terms employed—"person, corporation, property, business, occupation, or calling"—that this section has reference solely to *ad valorem* taxes on property. Certain of the terms employed are mere redundancies of expression, and are to be restricted by the manifest purpose of the section. The section cannot embrace ordinary privilege taxes, because they do not need to be assessed, and never are assessed, and because the work of classification for privilege taxes, except in the case of railroads, is always done by the legislature, and is never committed to the tax collector or board of supervisors. Back classification for ordinary privilege taxes is not necessary to enable the revenue agent to collect past due privilege taxes, for the reason that the right and authority of the revenue agent to sue for them is perfect without it. The use of the words "assessment," "property," "real estate," "personalty," negatives the idea that back classification for privilege taxes is contemplated in sec. 4. We

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construe sec. 4 to mean what it appears on its face to mean. We restrict it to back assessment of property for *ad valorem* taxation, and hold that it gives no warrant for back classification of railroads in order to an imposition of privilege taxes for past years.

Appellee undertakes to escape the force of this reasoning by contending that the franchise here sought to be taxed is property; that a privilege tax is ultimately a tax upon the use of the property, and is, in effect, a tax upon the property. We do not concur in this, but hold that the tax sought to be collected is a privilege tax proper. But if appellee's contention in this regard were correct, and the tax sought to be collected were indeed essentially a property tax, still the commission would be estopped now to back assess this franchise for a property tax. It is a matter of which this court will take judicial notice that these railroads were assessed for *ad valorem* taxation, for the years 1898 to 1903, agreeably to provisions of Code 1892, § 3877, and that they have paid the taxes assessed against them. It was by the statute made the duty of the railroad assessors, in fixing the assessments of the said railroads, to take into consideration the value of the franchise; and by the franchise, in this connection, we understand the right of the railroad companies to operate their railroads in the manner, on the conditions, and with the powers prescribed and granted in their several charters. They are conclusively presumed to have taken the value of the franchise into consideration in fixing the assessment of these railroads for the years in question, and this cannot now be questioned in any tribunal. It is *res adjudicata.* It has been expressly adjudicated by this court that, as to all other matters (than exemptions) in the assessment and valuation of the property of railroads, the judgment of the railroad assessor is conclusive. *Railroad Company* v. *Adams,* 81 Miss., 105 (32 South. Rep., 937). See also, specially, *Railroad Company* v. *Adams,* 77 Miss., at p. 778 (25 South. Rep., 355), and note authorities there quoted.

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But, of course, this doctrine is not to be extended to assessments procured to be made by fraud nor to assessments made in conscious and deliberate defiance of law. As to all such, whether the property withheld from or escaping assessment be franchise or other property, we adhere to and reaffirm the wholesome doctrine announced in *Revenue Agent* v. *Clarke,* 80 Miss., 134 (31 South. Rep., 216).

The franchise of these railroads having been assessed for *ad valorem* taxation (and for this, in the absence of fraud and the like, as indicated, we have a conclusive presumption of law), it is not now in the power of the railroad assessors to single out some constituent element of their franchise, or some mere incident thereto, and impose an *ad valorem* or property tax upon it. This would be double taxation and violative of the constitutional provision that taxation shall be equal and uniform. It would also, as has been suggested, violate the constitutional mandate that property shall be taxed according to its value, in this—to wit, that a property tax upon railroad franchises at the rate of $10 per mile, without regard to varying conditions, the volume of business, the earning capacity, or the value of the several roads upon which it is levied, would be a purely arbitrary tax, not equal and uniform and not according to value.

If the back tax now sought to be collected of the railroad companies which are appellants in the cases now being considered can be upheld at all, it must be upon the ground that they are privilege taxes in the ordinary acceptation of the term. We have already reached the conclusion that they cannot be allowed and collected, because no provision has been made by the legislature for the back classification of railroads with a view to the imposition and collection of privilege taxes for past years. But there is another insuperable objection to the back classification of the railroads and the collection of the additional privilege tax of $10 per mile for the years in question. The power conferred upon the railroad commission by sec. 66, ch.

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5, p. 23, Acts 1898, to classify these railroads for privilege taxes, was exercised for each of the years from March 1, 1898, to March 1, 1903. It was the duty of the commission to classify them according to charter exemptions (from state supervision) and gross earnings. The commission classified them as railroads of the third class, and of the first, second, and third classes, respectively, saying nothing as to charter exemptions. This classification, in each case, was a judicial act. Everything was concluded by it which was comprehended or involved in it. It amounted to an adjudication that these roads were not liable for the years in question to the privilege tax of $10 per mile as railroads claiming exemption from state supervision. This judgment is final and conclusive, and cannot now be brought in question. *Railroad Company* v. *Adams,* 77 Miss., 778 (25 South. Rep., 355); *Railroad Company* v. *Adams,* 81 Miss., 105 (32 South. Rep., 937).

It is not necessary to the determination of these cases that we should pass upon the questions raised, and argued upon each side with such wealth of learning and cogency of reasoning, as to the application to these cases of the constitutional principles that the state shall not pass any law impairing the obligation of contracts nor deny to any person within its jurisdiction the equal protection of the laws.

Reversed, and judgment here in each case for appellant.

WHITFIELD, C. J., concurs in the result.

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Syllabus.

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JOSEPH T. JONES ET AL. v. WILLIAM O. ROGERS ET AL.

1. CLOUDS ON TITLE. *Equity. Code* 1892, § 500.

   The complainant in an equity suit to cancel clouds upon title to real estate, under Code 1892, § 500, providing for such suits in the chancery court, must show a perfect legal or a perfect equitable title in himself, independently of defects in the defendant's title.

2. LANDS. *Description. Vicinity.*

   Lands in the vicinity of a state are not in, but outside of, the state, although near it.

3. SAME. *United States marshal. Execution. Return.*

   The return of a United States marshal on an execution to the effect that he had levied upon and sold lands, without designating in any way in what state or county they were situate, but showing that they were in the vicinity of the state including his district, is utterly void.

4. SAME. *Execution sales. Place. Act of congress, approved May* 19, 1828. *Revised Statutes of the United States, sec.* 914.

   United States marshals in making sales of land under execution, as a general rule, are required by law (Act of Congress, approved May 19, 1828; Revised Statutes of the United States, sec. 914) to conform to the laws of the state governing the subject of such sales, and they must be made at the place provided by the law of the state for sheriffs' sales of land under execution.

5. SAME. *Exception. Act of congress, approved February* 16, 1838.

   The exception to the general rule (Act of Congress, February 16, 1838) allowing marshal's sales of land in Mississippi to be made, upon the written request of the defendant, etc., at the place where the United States court for the district was holden, does not give validity to a marshal's sale not made at the courthouse door of the county in which the land lies, but "at Jackson," where the United States court was held, in the absence of the written request of the defendant, and its existence will not be presumed.

6. SAME. *Meaning of word "place" in the act.*

   The word "place" in the statute (Act of Congress, approved February 16, 1838) authorizing marshal's sales of land under execution,

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in Mississippi, to be made, upon written request of defendant, "at the *place* where the United States court for the district is holden," does not mean any place in the town or city where the court was held, but means the particular house in which the court held its sittings.

7. SAME. *Marshal's return. Presumption.*

Where a marshal made return of two sales, each of a different tract of land, under the same execution, in respect to one of which he set out with particularity the written request of the defendant that the lands first sold should be sold at the place where the United States court was held, and all the facts of the first sale, but in respect to the second sale he made no mention of a written request by defendant that the lands sold thereat should be sold at such place, the presumption is that no such written request was made.

8. SAME. *Statutes fixing place of sales. Mandatory.*

Statutes fixing the place for the sale of lands under execution are mandatory, and a sale made contrary to such a statute is void.

9. EXECUTION SALE. *Officer's return.*

The return of an officer on an execution showing the sale of land thereunder to a designated person does not transfer the title; it only gives the purchaser the right to demand a deed conveying the title.

10. SAME. *Absence of deed. Presumption.*

In a suit to confirm titles to real estate and to cancel clouds, where the complainant claims under a purchaser at an execution sale, in the absence of a showing that such purchaser's bid was consummated by a deed, it will be presumed after the lapse of many years that he transferred his bid or did some act renouncing it.

11. SAME. *Destruction of records.*

Under the allegations of a bill to remove clouds from title that the marshal made execution sale of the land to complainants' ancestor, and that the land records of the county were destroyed, it cannot be presumed that the marshal executed a deed to the purchaser, and that it was recorded.

12. SAME. *"Seized and possessed."*

The allegation of the bill to remove clouds from title that complainants' ancestor, under the execution sale to whom they claim, was at the time of his death seized and possessed in fee simple of the lands, is merely a legal conclusion, and a statement of constructive possession, not of actual possession.

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13. SAME. "*Yielded up possession.*"

The allegation of the bill to remove clouds from title, complainants claiming under an execution sale, that defendant in execution "yielded up possession" of the lands "after" the sale, is insufficient to show to whom or when possession was yielded, or that the purchaser, or any one claiming under him, ever had actual possession.

14. SAME. *Possession under sale.*

A deed to the purchaser at execution sale will not be presumed in the absence of a showing that he went into posesssion under the sale and continued in possession.

15. SAME. *Statute of limitations. Suit in equity. Code* 1892, § 2731.

Under Code 1892, § 2731, providing that a person claiming land in equity may not bring suit to recover the same but within the period during which he might have brought an action at law, a suit for the recovery of land, concealed frauds excepted, is barred in ten years after the complainant's right of action accrued, without regard to whether defendant has or has not been in the adverse possession of the land.

16. SAME. *Concealed fraud.*

In order to bring a case within the exception to Code 1892, § 2731, providing that in every case of concealed fraud the right of a person to bring suit in equity for land, of which he may have been deprived by such fraud, shall be deemed to have first accrued at, and not before, the time at which the fraud shall or, with reasonable diligence, might have been first known or discovered, it is necessary for the complainant to aver and prove:

(*a*) The acts or facts constituting the fraud;

(*b*) That the acts or facts constituting the fraud were committed by defendant or some one in privity with him;

(*c*) That the acts or facts constituting the fraud were concealed from complainant by defendant or some one in privity with him;

(*d*) That complainant did not discover or know of the fraud more than ten years before beginning his suit; and

(*e*) That complainant exercised reasonable diligence to discover the fraud sooner, or that he could not, with reasonable diligence, have discovered it sooner.

17. SAME. *Chancery pleadings. Fraud.*

A bill in equity for lands will not escape a demurrer setting up the statute of limitations on the ground of a concealed fraud

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unless the facts of which the charge of fraud is predicated be specifically pleaded and the acts which are charged to have been fraudulent clearly set out.

FROM the chancery court of Harrison county.

HON. STONE DEAVOURS, Chancellor.

Rogers and others, appellees, were complainants in the court below; Jones and others, appellants, were defendants there. From a decree overruling demurrers to the bill of complaint the defendants appealed to the supreme court. The facts are fully stated in the opinion of the court.

[For the decision of a motion in the case, see *Harrison County* v. *Rogers, ante.* 578.]

Ford & White, Bowers, Neville & Griffith, and *W. G. Evans, Jr.,* for appellants.

The whole case of appellees, as exhibited in this bill, rests upon the assumption that the alleged sale by the United States marshal at Jackson on October 28, 1839, vested in complainants either the entire legal and equitable title or such an equitable title as would enable complainants to maintain a bill to divest the legal title out of the person now holding same and vest it in complainants, and incidental thereto obtain such other relief as might be necessary to render a decree on the merits of this contention effective.

The court will observe that there is no allegation in this bill that any United States marshal ever executed or delivered to complainants' ancestor a deed conveying, or purporting to convey, this or any other land, but simply that a sale was made by such marshal on October 28, 1839, and that John Martin became the purchaser, and that he, Martin, paid the bid. They allege no facts, such as the execution of a conveyance by the marshal pursuant to a sale under an execution, so as to raise the presumption that in truth and in fact a levy and sale had been made pursuant to law, but, on the contrary, stand upon this so-called marshal's return to establish said facts, other than the allegation of the payment of the bid, and then invoke the

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rule that the court will presume the execution and delivery of a deed from the facts established by this return as shown in the exhibit to the bill. This so-called return is not signed by any person claiming or assuming to act as a United States marshal, nor by any person styling himself as the deputy or properly authorized agent of such officer. It is signed simply "Wm. M. Gwin, Marshal, per F. S. Hunt." Now, who F. S. Hunt was, nowhere appears in this record. Whether he was a deputy marshal or one of those convenient personages who do what is commonly called the "heavy standing around," is wholly unexplained, and we insist that his signature of the name of the United States marshal to this document is insufficient to elevate this so-called return to the dignity of an official "certificate" or "attestation" so as to bring it within the purview of sec. 1796 of the code.

If we are mistaken in the position that this so-called return on this exhibit is not *prima facie* evidence of the performance of the acts therein referred to by a United States marshal, then we insist that, treating it as a return of such officer and taking all the facts stated to be true, these facts show a disregard of a plain statute and render a sale as recited utterly void.

Statutes fixing the time and place of sales by sheriffs under execution are mandatory, and a sale made at a time or place other than that fixed by law is void. *Koch* v. *Bridges,* 45 Miss., 257; *Loudermilk* v. *Corpening,* 101 N. C., 640; *Moody's Heirs* v. *Moeller* (Tex.), 13 Am. St. Rep., 839. It appears in the report of *Moody Heirs* v. *Moeller, supra,* that a sale was made by a United States marshal, under an execution at law, in the city of San Antonio; but instead of making the sale in front of the county courthouse door (the Texas statute being the same as our own on this subject), the marshal made it in front of the federal building, standing on the opposite side of the street from the county building. The court held that the statute fixing the time and place of sales was mandatory, and that place meant in front of the county courthouse door, not some other

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place in the same community or vicinity, and that the sale was not simply *voidable, but void.*

By sec. 3 of the act of congress, approved May 19, 1828, it was provided:

"That writs of execution and other final process issued on judgments and decrees rendered in any of the courts of the United States and proceedings thereon shall be the same, except their style, in each state, respectively, as are now used in courts of such state; *provided, however,* that it shall be in the power of the courts, if they see fit in their discretion, by rules of court, so to alter final process in said courts as to conform the same to any change which may be adopted by the legislature of the respective states for state courts." Quoted from opinion in *Beers* v. *Houghton,* 9 Pet., 337. This statute is the origin of sec. 914 of the present Rev. Stats. U. S.

By sec. 4 of a special act of congress, approved February 16, 1838, it was provided:

"That the marshal of the several districts of the state of Mississippi, in addition to the several sale days now allowed by law, may be authorized to sell property at the courthouse in each county on Monday of each week, and on the first and second days of each term of the district court; and he may, at the written request of the defendant, change the sale of property to the place where the United States court for the district is holden; *provided,* in the opinion of the marshal, the interest of the plaintiff is not compromitted thereby."

The state statute which governed in matters of this character, except in so far as modified by this special act of congress, provided that all sales of land should be made at the courthouse of the county and on the first and third Mondays of every month. Sec. 17, Act June 22, 1822; How. & Hutch. Dig., 633.

The courts, both state and federal, have, in passing upon the validity of execution sales made by federal marshals, uniformly held that the federal officer in the execution of process of this kind must conform strictly to the state law. In *Smith* v. *Cock-*

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rell, 6 Wall., 756–759, the supreme court of the United States held that the failure of a United States marshal, in selling property under execution in the state of Kansas, to have an appraisal made in accordance with a statute of Kansas, rendered the sale void and conferred no title. See also *Moody's Heirs* v. *Moeller,* 72 Tex., 635 (13 Am. St. Rep., 839); *Norneman* v. *Norris,* 47 Fed. Rep., 438.

There is no special presumption hedging around the acts of United States marshals in executing process, even though hoary with age and come to us from so respectable a source as the administration of Martin Van Buren. And if it appear from the alleged return on this ancient document that the marshal disregarded a plain provision of law, then his acts were void and incapable of transmitting title. It is manifest that this marshal had no legal power or authority to make a sale, under execution, of land then situated in Hancock county, in Jackson, except upon the *written request* of the defendant, James McLaran. And if the United States marshal held such request, the only place in Jackson where he was authorized to make such sale was in front of the building or *place* where the United States court was held at the time. Now, if the court will inspect this exhibit, it plainly appears that this marshal made two different sales of land under it. The first sale was made on the 7th day of October, 1839, in front of the statehouse in Jackson, of several tracts or bodies of land in various counties, and this first sale, as appears by the express language of the so-called return, was made at Jackson on a *written request* of the defendants in execution. The alleged sale of the lands in controversy, as appears by this so-called return, was made three weeks later, or on the 28th of October, 1839, in Jackson, but not one word is said about its having taken place there because of any *written request* or other request of defendant in execution. The law having fixed the place of such sales at the county courthouses, and the marshal being required to make such sales there, except where a defendant should make a *written request*

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otherwise, we insist that the existence of such written request was absolutely necessary, and that the court cannot presume in a case like this, where all of the acts of the officer are set out, and where it is silent on this point, that such request existed. We undertake to say that in a case of this kind, where no deed was ever executed and where the sole evidence of such sale is the so-called return, the return itself is not sufficient proof of the existence of such a vital and jurisdictional fact, and that the writing itself must appear.

The word "place" in this special act of congress, authorizing sales at the place where the United States court is held, had reference to the building in which it was held. The object of the rule requiring a strict compliance with statutes fixing the time and place of judicial sales would altogether be defeated by holding that place within the statute meant anywhere in the municipality or vicinity of the court. As held in *Moody's Heirs* v. *Moeller, supra*, it means the building in which the court is held, and that a sale in the same town or city is not a compliance with the law. There is nothing, either in the bill or the return on the execution, to show where the federal court was holden in 1839.

It has been expressly held in *Cooper* v. *Granberry,* 33 Miss., 117, that a return on a writ of execution reciting a purchase by a person named does not operate to transfer the title, but simply confers a right, if payment is made, to compel either the sheriff or defendant in execution, as the case may be, to execute a deed conveying the title. In this case the court uses the following language:

"It is again said that the return on the execution under which G. W. Cooper purchased the land, when it was sold as the property of the defendant, shows that one Walker bid off the land. The return does not transfer the title. It is at most only evidence that Walker was entitled to demand a deed from the sheriff, and he could, if disposed to, assert his right, force the sheriff (or Cooper, holding the deed from the sheriff) to convey

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to him, Walker. But in the absence of a showing that his bid was consummated by a deed, it will be presumed after this lapse of time that he transferred his bid or did some act renouncing it."

The lapse of time in that case, as appears by the report, was fifteen years. Applying this rule to the case at bar, what presumption arises? Here no deed was ever executed by the marshal, and no act of possession alleged by the purchaser, his heirs, or vendees, and sixty-five years afterwards the lands are in the occupancy of defendants. The only presumption that can arise, or that is entitled to a moment's consideration, is that John Martin either renounced and abandoned his bid or transferred it, if indeed it had any force, to those in privity with the present occupants. So we insist that every fact alleged in this bill, as construed in the light of the contents of the exhibits, shows that this pretended marshal's sale was void and incapable of conferring title, and that every presumption of law arising from the facts alleged irresistibly leads to the conclusion that this whole claim of title, founded upon this so-called return, is a myth and creation of the speculative values ruling around Gulfport.

The real purpose of this suit, and the ground upon which relief must be granted to complainants, if it is granted at all, is to divest the legal title out of James McLaran or his heirs, or out of the marshal or whomsoever it may be in, and vest it in these complainants. The mere return of this marshal, under *Cooper* v. *Granberry, supra,* being insufficient to convey the legal title, it, the legal title, necessarily remained in McLaran, the defendant in execution, for want of a proper deed to convey it; and unless the ancestor of complainants took possession so as to obtain a title by adverse possession or otherwise to protect his supposed equity arising from having bid in the lands, it was incumbent upon him or his heirs to file the necessary suit to divest the legal title out of McLaran or to compel the marshal, if he could, to convey it, and such a suit

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is required by sec. 2731 of the annotated code, which has been the law at least since 1857, to be filed within ten years after the right of action accrues, and not after. The pretended fraudulent concealment set up in this bill is wholly insufficient to protect complainants, for the reason that it is nowhere alleged that defendants or any persons in privity with them were the parties guilty of the acts complained of. *Fleming* v. *Grafton*, 54 Miss., 79. And, moreover, no facts are alleged constituting fraud, but mere vague conclusions. We also insist that these vague allegations of a fraudulent conspiracy, which has just been discovered in recent years, are themselves an admission that defendants and those under whom they claim have been in possession of this property beyond the statutory period.

McWillie & Thompson, on same side.

1. While the first sale is recited to have occurred "in the city of Jackson, at the front door of the statehouse," the second sale is merely recited to have occurred "in Jackson."

The federal statute provides that on the written request of the defendant the place of sale may be changed from the county courthouse to "the place where the United States court for the district is holden."

The statute did not mean any place in the town or city where the court might be holden, but the particular place therein, the building, in which the court's sittings took place. If, therefore, we read "in Jackson" to mean in the city instead of the county of Jackson, the return does not show compliance with the law. In the same sentence authorizing the change on request of defendant, sales on Monday in each week are also authorized to be made in the counties; but it will be noted that these were not to be made merely at the county seat, but at the courthouse of the county, the particular building in which the public affairs of the county were conducted. The city of Jackson, under the municipal charter in force at the time of this sale, covered

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quite an extensive area, much of which was virgin forest. Acts 1834, p. 136.

While it is really unnecessary to press the argument further along this line, we also insist that even if the recital as to the place at which the first sale was made be applied to the second sale, the bill remains equally bad on demurrer. Neither does the bill allege nor the return recite that the statehouse in Jackson was, at the time of the sale or making of the request, the place where the federal court held its sittings. That building was one erected by the state and devoted to state as contradistinguished from federal purposes, and to indulge a presumption that the federal court sat in it because of this return would be as irrational as to say that the same tribunal held its sittings at some hotel of the city, had the return mentioned such hotel as the place of sale. Moreover, such history as we have, written and unwritten, makes it wholly uncertain whether the marshal in using the word "statehouse" meant one or the other of two buildings then existent in the city of Jackson.

Certainly until 1839 the Mississippi statehouse was located at the northeast corner of Capitol and President streets in said city, on what is now the site of the well-known Harding building. In January, 1839, Governor McNutt, in his message to the legislature which had just assembled, congratulated the body that the construction of what is now the old capitol building had so far progressed as to admit of its sessions being held therein, although the building was far from being completed. We quote from memory, but feel sure that the legislative jour-See Mississippi Official and Statistical Register, 1904, pp. 586, 611, 612. The terms of the federal court in 1839 occurred, as they now occur, on the first Mondays in May and November; so that if any term had been held in what is now the old capitol, it could only have been the May term, 1839, at which time the building was doubtless unfinished, and the statehouse located on the site of the Harding building must have been of too small

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dimensions to meet the needs of the state, much less afford accommodations for the federal courts. Doubtless during the period of transition from the one building to the other, and for some time afterwards both buildings were known as the "statehouse," and both could not have been the place where the federal court held its sittings.

Where a statute prescribes a place for sales under execution, it is to be taken as mandatory. *Koch* v. *Bridges*, 45 Miss., 247. The sale in the case was not made at the county courthouse, and was declared to be for that reason not merely voidable, but void, in a proceeding attacking it collaterally.

The name of the town in which the federal court sat would not designate the place where it was holden within the meaning of the statute in question. *Hartley* v. *Cazye*, 38 Minn., 325.

2. The complainants do not allege in their bill that the executions under which the land was sold were issued upon valid judgments of the federal court, nor that any judgment was ever rendered against the defendants in execution; but as the bill makes an obscure reference to "said judgment" and a certified copy of a judgment is exhibited as a part of the bill, we will treat the bill as alleging that the execution issued on that judgment.

The judgment exhibited with the bill is the final judgment rendered by the court in one of the cases mentioned in the marshal's return, *Wanzer & Harrison* v. *McLaran & Hammond*, and the execution under which it is claimed the land was sold purports to have been issued, not on that judgment, but on a forfeited forthcoming bond, the existence of which is not alleged. Under the state law in force at that time, and by which procedure in the federal courts was regulated, after forfeiture of a forthcoming bond, execution was not issuable on the judgment of the court, but on the bond. Hutchinson's Code, p. 910. Furthermore, it is well established that the acceptance by the officer of a forthcoming bond under the statute cited operated as satisfaction of the judgment of the

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court and extinguished its lien. *Connell* v. *Lewis,* Walker (Miss.), 251; *Stewart* v. *Fuqua, Ib.,* 175; *Sampson* v. *Breed, Ib.,* 267; *Davies* v. *Dixen,* 1 How. (Miss.), 64; *Weathersby* v. *Proby, Ib.,* 98; *Bank* v. *Patton,* 5 *Ib.,* 200; *Chilton* v. *Cox,* 7 Smed. & M., 791; *McComb* v. *Ellett,* 8 Smed & M., 505; *Robinson* v. *Painter,* 8 Smed. & M., 613; *Pritchard* v. *Myers,* 11 Smed. & M., 169.

The original judgment being merged in the statutory judgment on the bond, an execution issued on it is void. *Bell* v. *Tombigbee R. R. Co.,* 4 Smed. & M., 549; *Moody* v. *Harper,* 28 Miss., 615; *Witherspoon* v. *Spring,* 3 How. (Miss.), 60; *King* v. *Terry,* 6 How. (Miss.), 513; *Brown* v. *Clarke,* 4 How. (U. S.), 12, 13.

It is thus seen that the complainants, who do not allege that any forthcoming bond was ever given, rely on a judgment that was satisfied if it was given, and on an execution which was void if issued on the judgment they set up as authorizing it.

The judgment relied on was satisfied before the issuance of the execution, if a forthcoming bond was given, and an execution issued on a satisfied judgment is void, especially where it discloses to the purchaser under it the fact of the satisfaction of the judgment. If no forthcoming bond was given, the execution in question was void, for it purports to be founded on a statutory judgment which could not exist without the necessary precedent conditions of the existence and forfeiture of a forthcoming bond, and is against a new party, the surety on the alleged forthcoming bond, who was a stranger to the original judgment.

The bill is clearly obnoxious to demurrer, for the reason that it does not allege that a forthcoming bond was given and forfeited, for the sale relied on was under an execution which was not authorized by law except after the forfeiture of a forthcoming bond, and the showing made of the original judgment in no wise helps the case.

"One predicating title to property on an execution sale must

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show that there was a valid, subsisting judgment under which the sale was made pursuant to a valid execution." 25 Am. & Eng. Ency. Law (2d ed.), 821. This principle so pervades the judicial system of our own state as to make the citation of decisions superfluous.

3. A most important question arises on the consideration of § 2731, Code 1892, prescribing a limitation as to suits in equity by persons claiming land, which has never, so far as we are aware, been expressly adjudicated by this court.

The limitation as to actions at law for the recovery of land (sec. 2730) prescribes that no such suit shall be brought but within ten years next after the time at which the right to make the entry or bring the action shall have first accrued to the plaintiff or some person through whom he claims. In other words, if the defendant has had continuous adverse possession for ten years, the plaintiff's action at law will be barred by this section of the code.

The section relating to suits in equity by persons claiming lands is quite different, however, and does not prescribe that they cannot be brought but within ten years after the right to make an entry or bring an action at law shall have accrued. On the contrary, the provision relates to time only, and in no way to the condition of adverse possession; and there is nothing therein of which to predicate the adverse possession idea, since a defendant's possession is not essential to a complainant's right to sue in equity. It prescribes merely that such suits shall not be brought but within the period during which by virtue of § 2730, Code 1892, an action at law might have been brought—that is to say, within ten years after the accrual of the right to proceed in equity, which is wholly unaffected by the question of possession.

This view is in perfect harmony with the spirit of the law, which manifestly contemplated uniformity in time—that is to say, that the period of prescription should be ten years next after the right of action shall have accrued at law and ten

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years next after the right to proceed in equity shall have accrued. Insisting that this statute is available in cases where there has been no adverse possession by defendant, we invite consideration of its terms.

4. If ever a proper case existed for the application of the doctrine of *laches*, this is the case.

In the later decisions of this court, where the doctrine of *laches* has been considered, the party against whom it was invoked will always be found, we think, to have been the holder of the legal title. Under the law in force when the sale in question was made, the execution of a deed by the officer was essential to the vestiture of title in the purchaser. Hutchinson's Code, p. 907.

These complainants do not show by their bill that they have the legal title, but assert a supposed equity, and the consideration of the cause involves, therefore, a comparison of the equities of the parties complainant and defendant.

5. The court will observe that the return on the execution nowhere sets out the state or county in which the land is located, but does describe it as being "in the vicinity of Mississippi." The language quoted cannot be an error in the transcript, as we are informed by counsel who represented defendants in the lower court that in several copies of the certified copy held by complainants, which have come under their observation, the language is precisely identical with that shown by the transcript.

According to this recital the land sold at the second sale was not in Mississippi, but in the vicinity of that state. To be in the vicinity of certain territory is to be outside of it, although close to it, and proximity and remoteness are alike as to that matter, since both denote land outside of such area. To be in the vicinity of a place is not to be in the place nor necessarily even adjacent or contiguous to it, but in the neighborhood of it. 28 Am. & Eng. Ency. Law (1st ed.), 449; Anderson Law Dictionary, title, "Vicinity."

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If the governmental subdivisions had alone been given, an argument might be made for the sufficiency of the descriptiou as meaning land of that description within the district of the marshal, but that will not do where the return shows that the land is not in, but "in the vicinity of, Mississippi." The sale being *in invitum* the intention of the officer cuts no figure in the matter.

Harper & Harper, for appellees.

This is a bill filed by the appellees to remove clouds from the title to certain lands of which they claim to be the real owners in Gulfport, county of Harrison, and state of Mississippi.

They deraign their title as follows: First—A patent to the land from the United States government to James McLaran. Second—A purchase by their ancestor, John Martin, at execution sale under a federal judgment, obtained in the federal courts at Jackson, Mississippi, about the year 1837, and sold under judgment in the year 1839. The bill was demurred to, and the demurrer was overruled by Chancellor Stone Deavours, in vacation, from which decree overruling the demurrer, an appeal was taken, and the case now stands here for the determination of this court on the single question as to whether the chancellor properly or improperly overruled the demurrer.

The bill shows that the said John Martin purchased the land at execution sale, paid his money, and the same was knocked off to said John Martin as the highest and best bidder for cash; that he was placed in possession of the property by the United States marshal by and with the consent of the judgment debtor, James McLaran; that he continued in possession until the time of his death, in the year 1848, and that his heirs have been in possession, constructively without their knowledge, until a few years ago; that certain parties, most of whom were unknown to the appellees, knew of the claims, right, and title of the Martin heirs to this land, and had legal evidence of their title to this land in their own possession, which they carefully and

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intentionally concealed from these heirs of John Martin for their own individual advantage. The main actor in this transaction was the administrator of the James McLaran estate, a man whose position gave him a full and perfect knowledge of the indebtedness of McLaran and of the sale by the federal marshal, and also of the purchase of said lands by John Martin.

These heirs of John Martin who had for years been kept ignorant of the right and title of their paternal ancestor, John Martin, at length, by a mere accident, became aware of the fact through the unremitting efforts of purchasers to secure a perfect and cloudless title, which could not be done while the John Martin claim was kept in abeyance and a profound secret to all except this administrator of the McLaran estate and his associates. As soon as the discovery was made, the heirs took steps to bring suit for the recovery of the land. Hearing that J. T. Jones, one of the appellants, had offered to donate a portion of this land, situated in Gulfport, Harrison county, Mississippi, to the board of supervisors for courthouse purposes, and that this board had the acceptance under consideration, these heirs notified, through their attorney, the board of supervisors in open session not to accept the donation, as the right, title, and interest in the land belonged to these heirs of John Martin, and gave them a full outline of the character of this title, and that they were getting ready to sue for the land, and that if the county accepted this donation it would lead to litigation that would be expensive and troublesome. But the county accepted the donation in the face of all the conditions and warnings; or, rather, the board of supervisors accepted the donation.

The bill shows these facts, and was demurred to. The demurrer was overruled, and the parties required to answer. The question before the court at this time is, Whether the bill on its face presents such a title as can be the foundation for a permanent removal of a cloud.

The certified copy of the record in the case, under which

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John Martin bought at execution sale, shows a valid judgment, a valid execution, a valid levy, and a valid sale by a United States marshal, together with a memorandum in writing to whom sold, and all essential particulars necessary to take the case out of the statute of frauds, and conferred on the purchaser an equitable title and also an inchoate legal title to the land in question.

This fact cannot be denied, either under the state decisions or under the decisions of the courts of the United States. The heirs do not present a copy of the marshal's deed, it is true, made in pursuance of this sale to their ancestor, John Martin, which should have been, and doubtless was, recorded in the county of Hancock, where the lands were at that time, as all of Harrison at that time was a part and parcel of Hancock county. By reason of the great lapse of time, the marshal's original deed cannot be found, the courthouse of Hancock county having been destroyed by fire and the records all lost.

Some of the courts have held—notably in the states of Maryland, Louisiana, and Texas—that this title without a deed is in all respects a good and valid title and will support an ejectment even if no deed has been made. *Boring* v. *Lehman*, 5 Harr. & J., 233; *Leland* v. *Wilson*, 34 Tex., 91; *Fleming* v. *Powell* 2 Tex., 225; *Jonet* v. *Mortimer*, 29 La., 206; *Litchicum* v. *Remington*, 14 Pet., 91; *People* v. *Boring*, 8 Cal., 406; *Rucker* v. *Dooley*, 49 Ill., 223; *Cottingham* v. *Springer*, 88 Ill., 90; *Harmon* v. *Learned*, 58 Ill., 169; *Summers* v. *Palmer*, 10 Rich., 98; *Swank* v. *Thompson*, 31 Mo., 336; *Curtis* v. *Millard*, 14 Ia., 176; *Robertson* v. *Garth*, 41 A. D., 47 (6 Ala., 204); Freeman on Executions (2d ed.), sec. 324, and authorities there cited; *Legere* v. *Doyle*, 11 Rich., 101; *Ritter* v. *Scannell*, 7 Am. Dec., 77; *Stewart* v. *Stokes*, 33 Ala., 493; *Osgood* v. *Franklin*, 2 Wheat., 503; *Claggett* v. *Kilbourne*, U. S. Rep., 66 and 69 B; 17 bottom p. 212, L. C. P. Co., in the first and second Black and first and second Wallace; *Hooper* v. *Schumer*, 22 How., 235; *Finn* v. *Holmes*, 21 How., 481.

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Brief for appellees.

This case being in chancery, an equitable title is just as good as a legal title, although we shall insist that the Martin heirs hold and have not alone an equitable title and an inchoate legal title, but also have a perfect legal title by virtue of the lapse of upward of sixty years.

The bill shows that the ancestor, John Martin, was in possession of this land for more than nine years so far as was legally necessary to possession of wild lands as defined by law; certain it is that no other person claimed or possessed it during the years between 1839 and 1848.

At his death the legal seizin of this land descended to the heirs of John Martin, who remained in the constructive possession of the land until a few years since, as no one claimed or was in actual possession of this land. *Stumper* v. *Griffin,* 20 Ga., 312.

"The law, however, deems every person to be in the legal seizin and possession of the land to which he has a perfect and complete title, and this seizin and possession is coextensive with his rights, and continues until he is ousted thereof by an actual possession in another under a claim of right. This may be considered a settled principle of the common law, and has been recognized and adopted by the supreme court of the United States."

In regard to the number of years intervening between the death of John Martin and the suit brought by his heirs at law to establish their claim, see the following authorities: *Halstead* v. *Grinnan,* 15 U. S. Rep., 417. Justice Brewer, delivering the opinion of the court, says: "The length of time during which the party neglects the assertion of his rights, which pass in order to show *laches,* varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. It is an equitable defense controlled by equitable considerations, and the lapse of time must be so great and the relations of the defendants to the rights such that it would be inequitable to the plaintiff to now assert

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them. There must, of course, have been knowledge on the part of the plaintiff of the existence of the rights, for there can be no *laches* in failing to assert rights of which a party is wholly ignorant and whose existence he had no reason to apprehend." *Foster* v. *Railroad Co.,* 146 U. S., 99.

Lapse of time is no bar when fraud is involved. 6 Wheat., 497; 7 How., 825; 6 Wheat., 501; *Wilkerson* v. *Watkins,* 3 Pet., 34; *Doss* v. *Armstrong,* 6 How. (Miss.), 258.

The bill shows that the records of the federal court, where the case was pending, are lost or destroyed, perhaps during the civil war; that the party buying was not in possession; that it was the habit of this purchaser to record his deeds; that the records of the county of Hancock, where this deed should have been recorded, were destroyed by the burning of the courthouse at Bay St. Louis; that there were large sales of other lands in other counties made under the same executions by the same marshal at the same place—at Jackson, Mississippi, the place authorized by law for such sales to be made; and one of the bills shows that all the deeds were recorded in Rankin, Madison, and Hinds counties, where the records have not been destroyed by war or fire. This makes the non-appearance of this specific deed a clear case of accident. The presumption of its having been made is manifest under the authorities. 6 Wheat., 497 to 555.

We call attention to the case of *Reed* v. *Vaughan,* 55 Am. Dec., 134, where it is said the courts of the United States, though possessing a limited jurisdiction, yet in the intendment of law, stand upon the same footing as courts of record of general jurisdiction. All of the presumptions which are indulged in favor of superior tribunals of general jurisdiction are equally extended to the courts of the United States.

In pleading a judgment or a decree of one of the courts there is no more necessity for showing the facts which confer jurisdiction than in a plea of judgment of the highest tribunal known to the land. On the former point we cite the case of

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Thomas v. *Malcolm,* 99 Am. Dec., 459, which says courts go very far in upholding judicial sales, in presuming that officers in executing their process have performed their duty, especially after a great lapse of time. An officer is presumed to do his duty. *Bradley* v. *Sandelany,* 61 Am. St. Rep., 386; *Neal* v. *Nelson,* 53 Am. St. Rep., 590; *Evans* v. *Robertson,* 1 Am. St. Rep., 701.

A sale made by a United States marshal will be deemed valid until set aside by federal courts. *Kennedy* v. *Shepperly,* 57 Am. Dec., 29.

Argued orally by *James H. Neville,* and *T. A. McWillie,* for appellants, and by *A. Y. Harper,* for appellees.

HOUSTON,* J., delivered the opinion of the court.

This was a bill filed November 11, 1903, by appellees, William O. Rogers, *et al.,* against J. T. Jones and Harrison county, and also against the five parties constituting the board of supervisors of said county, as individuals and as members composing said board, to remove clouds from the title of complainants to certain lots in Gulfport, Harrison county, upon which the county courthouse and jail have been erected, specifically praying that a deed from S. S. Bullis to J. T. Jones, dated March 1, 1902, and one from J. T. Jones to said defendants, members of the board of supervisors, dated June 24, 1902, to said lands, be canceled and declared void as against complainants; that a writ of assistance issue to put complainants in possession of said lands, and that an accounting of the damage, destruction, and waste of a permanent nature committed by defendants be taken, and personal decrees be rendered against them for the amount found due, and also for a reasonable rent from the date of their occupation of said land.

The bill alleges that complainants "are the lineal descendants and sole surviving heirs at law of John Martin, deceased, who

*Chief Justice Whitfield, owing to illness, was off the bench when this case was argued, submitted, and decided. W. D. Houston, Esq., a member of the supreme court bar, was duly appointed, and presided not only in this case, but generally in the absence of the chief justice.

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was their '*ancestor,*' and who died intestate in New Orleans, La., in 1848, seized and possessed in fee simple" of said land. And they deraign their title as follows:

1. A sale of said land to James McLaran, December 11, 1834, and a patent issued to him by the United States government January 5, 1841.

2. A purchase by their said "ancestor" at a sale made by United States Marshal Gwin, on October 28, 1839, at Jackson, Miss., under an execution issued June 11, 1839, on a judgment rendered by the United States circuit court at Jackson, Miss., November 16, 1837, in the case of *Wanzer & Harrison et al.* v. *McLaran & Hammond;* that said lands were duly advertised and sold in the city of Jackson at the front door of the statehouse, at which sale they aver that "said John Martin became the highest bidder for $760; that said lands were knocked off to him, and he then and there paid the purchase money to said United States marshal, and that he (Martin) owned the same until his death, and that his heirs had never sold or disposed of same in any manner whatever;" that said James McLaran, defendant in execution and also patentee of said land, *yielded up possession* of said land after sale of same on October 28, 1839, and never afterwards during his life exercised any acts of ownership or claim whatever over same; that *divers* persons *set about* to defraud and cheat complainants out "of said lands, and did, without authority of law, sell and convey same and concealed as far as possible all facts of this sale, when *they* knew that John Martin was the owner by virtue of said sale of all the right, title, etc., which said McLaran had in and to said lands; and they knew when Martin died, in 1848, that his said heirs became vested with all right and title thereto which said Martin and McLaran had to same, but, notwithstanding this fact, and that they knew of the residence of complainants, yet they did combine and confederate to get possession and dispose of said lands, and did conceal and secrete all the facts from complainants, who were *then* infants;

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and that complainants have just of *recent years* learned the *facts* in connection with the *sale* and *purchase* of said lands, and, after learning that they had been defrauded and cheated of their *bona fide* property, they at once set about establishing their claim; hence the delay in bringing this suit."

It further alleges that J. T. Jones, under a spurious deed, duly recorded, pretends to have title to said lands, and has gone into *possession* thereof, and, although he had no right or title, he made a deed thereto to Harrison county, or to the members composing its board of supervisors and to their successors in office, conditioned that if said county shall at any time cease to use said land for a courthouse and court purposes, then the title shall cease and revert to said grantor; that said board did then and there combine and confederate with co-defendant, Jones, to cast a further doubt and cloud on the title of complainants, and did then and there record an order on their minutes, accepting this conditional deed of gift in their own name, over the objection and protest of complainants; and that said deed and order of acceptance are void under § 303, Code 1892, as being *ultra vires;* that said board has erected on said land a courthouse, etc., against the consent and protest of said complainants, which constitute a public and private nuisance and ought to be abated. Copies of both of the above deeds, and also of the judgment, execution, and return thereon, are made exhibits to the bill.

In view of the importance of this suit and of the fact that we have been informed that this is a test case as to many others involving the same question, we have thus fully set out all of the material allegations of the bill, in order that the grounds upon which our decision is based may be manifest.

To this bill separate demurrers were interposed by J. T. Jones and by his co-defendants, the members of the board, both in their individual and official capacities; but the main grounds of both demurrers are substantially the same. Aside from the *general* ground of want of equity on the face of the

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bill, for the sake of brevity and perspicuity, the *special* causes of demurrer assigned may be grouped as follows:

1. That the allegations of the bill do not warrant the *legal* conclusion that complainants are all the heirs at law of John Martin or that they have any title or interest in said lands.

2. That the bill seeks to divest the legal title out of the heirs at law, devisees or legal representatives of James McLaran, the patentee and defendant in the execution, but does not make any of them parties; and, hence, there is a non-joinder of parties.

3. That, upon the facts averred in the bill and exhibits, the alleged sale of October 28, 1839, was not made either at the time or place fixed by law for making such sales, and was void, and John Martin acquired neither the legal nor equitable title to said lands thereat.

4. That whatever right or interest complainants or John Martin acquired under said sale is now barred by the ten years' statute of limitations.

5. That the alleged fraudulent concealment that has, for a half century, kept complainants in the dark as to their rights, is not alleged to have been the act of any of defendants or any one in privity with them.

6. No facts stated from which any *conclusion* can be drawn that complainants have been defrauded by any one acting in concert with, or in knowledge of, defendants.

Both demurrers being overruled, the defendants were granted, and prosecuted, this appeal.

We waive a discussion of the first and second causes of demurrer as above set forth, as, in our opinion, the case can and should be decided upon *broader* lines.

In bills to remove clouds from title certain general principles have been so well and so long settled in this state as to have become almost axiomatic. In fact, it would hardly be necessary to *state* them, but that their proper application to

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the facts alleged in the bill and exhibits in this cause will, in our opinion, be determinative of this controversy.

Those general principles are that when a party comes into a court of equity and asks its active intervention to vest title in him or to remove clouds from his title and cancel the title of a defendant, it is incumbent upon him to allege and show that he has a *perfect* legal or a *perfect* equitable title to the property; that if he fails in this, he must necessarily fail in his suit, as, without such a title, he is not the *"real owner"* within the contemplation and the very language of our statute (Code 1892, § 500), as was expressly held as far back as 1873 in the case of *Carlisle* v. *Tindall,* 49 Miss., 229, in construing the words *"real owners"* used in Code 1871, § 975.

And this, regardless of whether the title of defendant be *good* or *bad, valid* or *invalid.* Complainants in such cases have no reason to concern themselves about the title of the *adversary,* and cannot even bring it in *question.* In fact, a complainant need not even point out any defects in defendant's claim, even though he may describe in his bill the instrument on which such claim is based. He cannot maintain his suit because of any *defects* that may exist in *defendant's* title. He must recover, if at all, on the *validity* of his *own.*

It would be a vain parade of research to cite all of the decisions of this court sustaining these propositions, which of course are recognized by learned counsel for appellees. Many cases will be found in the annotations under Code 1892, § 500.

We only deem it necessary to cite the following (not annotated), which *distinctly* and *specifically* announce these principles: *Hart* v. *Bloomfield,* 66 Miss., 100; *Goff* v. *Cole,* 71 Miss., 46; *Wilkinson* v. *Hiller,* 71 Miss., 678; *Gregory* v. *Brogan,* 74 Miss., 699; *Wilberger* v. *Pucket,* 78 Miss., 650.

Now, waiving any discussion as to the validity or invalidity of the title of defendants under their respective deeds, which would be but a consumption of time, in view of the conclusion

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we have reached, let us consider whether the bill and exhibits allege such facts as show that complainants have either a perfect legal or a perfect equitable title to the lands for which they bring this suit.

It will be observed that the bill does not aver, and complainants do not claim, that they or their ancestor, John Martin, have or ever had a *deed* of any kind whatever to said lands, or that they became the real owners by adverse, open, and notorious possession thereof.

Upon what, then, do they base their claim that they are the real owners, either legal or equitable, of the lots in controversy? This is answered not only by the brief of counsel for appellees, but, after alleging the marshal's sale of October 28, 1839, before mentioned, the bill *expressly* and *explicitly* alleges "that they" (complainants) "are claiming their rights and title to this property under this *marshal's sale*."

Without considering or deciding as to whether McLaran, to whom no patent was issued until January 5, 1841, had any title subject to sale under execution on October 28, 1839, or as to whether the pleadings show that this was a sale under a *valid* execution, based upon a *valid* judgment—and, if so, whether said judgment had been previously satisfied—we proceed to consider "Exhibit A," filed with the bill, which, under Code 1892, § 528, "must be considered on demurrer as if copied in the bill." Indeed, the bill specifically states that the "facts of this sale will more *fully* and *at large* appear" by reference to "Exhibit A," which is prayed to be made a part thereof. This "Exhibit A" is a certified copy of the following papers:

1. A judgment by default, rendered November 16, 1837, by the United States circuit court in the case of *Wanzer & Harrison* v. *McLaran & Hammond,* for the sum of $4,121.86.

2. The execution issued, June 11, 1839, on said judgment.

3. The marshal's return on said execution. This return shows that the marshal made two *separate, different,* and *independent* sales of lands under this execution. The recitals of

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the return which relate to the sale of the *lands in controversy,* on October 28, 1839, are as follows:

"This execution, together with the others mentioned above, was also levied on the following described lands—to wit: Secs. 35 and 36 in T. 7, R. 11, west, and fractional secs. 1, 2, 3, 8, 9, and 10 in T. 8, R. 11, west—all lying on or near the seashore in the *vicinity* of Mississippi—which said lands, after having been duly advertised, were sold *in Jackson,* on the 28th day of October, 1839, to John Martin, for the sum of $760, he being the highest, best, and last bidder." Signed "Wm. M. Gwin, Marshal, per *F. S. Hunt.*"

It will be noted that this *return* does *not* even recite or show that John Martin, through whom complainants claim, ever *paid* his $760 bid for said land; but the *bill does* allege this, and hence, on demurrer, this fact must be taken as admitted.

It will also be observed that this sale and return purport to have been made and the return is signed not by the United States marshal *himself,* but by "Wm. M. Gwin, marshal, per *F. S. Hunt,*" while the bill alleges that the "sale was made by the *marshal* of the United States, *Wm. M. Gwin.*"

Of course, it is well settled in this state that when an exhibit is made a part of the bill, by Code 1892, § 528, and is contradictory to some averment in the bill, the fact will be taken in conformity with the exhibit. *House* v. *Gumble,* 78 Miss., 259; *McNeill* v. *Lee,* 79 Miss., 459.

It is insisted by appellants that the question as to whether the alleged return by the United States marshal is in *fact* such a return by said officer or by some private person, and the *legal construction* to be given this return, are questions for the court, regardless of the averments of the bill; that the so-called return is not signed by any person *claiming* or *assuming* to act as the United States marshal, or by any person *styling* himself the deputy or properly authorized agent of such officer; that *who* "*F. S. Hunt*" was, nowhere appears from this record; and that, therefore, the sale was void.

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We refrain from deciding the question thus presented, preferring to predicate our conclusion upon other and more important grounds; for, in our opinion, this sale to John Martin is absolutely void, under well-recognized principles, for many reasons, *inter alia:*

1. Because the land alleged to have been sold was *insufficiently* described. The return on the execution utterly fails to show the county or the state in which said lands were situated, nor does it show anything from which this can be determined.

It described all of the lands sold at that sale as "lying on or near the seashore in the '*vicinity*' of Mississippi."

According to this description, none of this land was *in* this state *at all,* but was "in the '*vicinity*' of Mississippi."

Certainly, to be in the *"vicinity"* of a certain county or state is not to be *in* that county or state, but to be *outside* of it, though near it, only in the *neighborhood* of it.

Etymologically and by common understanding, *"in the vicinity"* means in the neighborhood, and "neighborhood," as applied to place, signifies nearness.

"In the vicinity" does not even mean adjoining to or abutting on, but merely close by or neighboring country. Webster's International Dictionary, revised and enlarged; Anderson's Law Dictionary, title, "Vicinity;" English's Law Dictionary, title, "Vicinity;" vol. 8 of "Words and Phrases Judicially Defined," p. 7317; 29 Am. & Eng. Ency. Law (2d ed.), p. 1056.

We deem this so clear as to require no further elucidation.

The other descriptive words, *"on or near* the *seashore,"* cannot help the description, for the land might be "on or near the seashore" and still be in any state, from Mexico to Florida, except Mississippi; for the recital describing the land as being "in the *vicinity* of Mississippi" shows absolutely that it is not *in this* state.

2. This sale was not made at the place prescribed and required by the law under which it was made. The language

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of the statutes in force at the time this sale was made, as to *where* such sales should occur, is clear and unmistakable.

Section 3 of act of congress, approved May 19, 1828, provided: "That writs of execution and other final process issued on judgments and decrees rendered in any of the courts of the United States and proceedings thereon *shall* be the same . . . in *each* state, respectively, as are now used in courts of *such* states," etc. *Beers* v. *Haughton,* 9 Pet., p. 337 (Lawyer's ed., book 9, 149); *Smith* v. *Cockrell,* 6 Wall., 756 (L. ed., vol. 18, 973). This statute is the origin of sec. 914 of the Rev. Stats. U. S.

Section 4 of a special act of Congress, approved February 16, 1838, provided: "That the marshal of the several districts of the state of Mississippi, in addition to the several sale days now allowed by law, may be authorized to sell property at the *courthouse* in *each county* on Monday of each week and on the first and second days of each term of the district court; and he may, at the *written request of the defendant,* change the sale of property to the *place* where the United States court for the district is holden; *provided,* in the opinion of the marshal, the interest of the plaintiff is not compromitted thereby."

The Mississippi statute, which governed such sales at the time this one was made, provided that all sales of land should be made at the *courthouse* of the *county*, and on the first and third Mondays of each month. Sec. 17, Act June 22, 1822; How. & Hutch. Dig., 633. Decisions of the supreme court of the United States, as well as of various states, have placed beyond the realm of controversy the proposition that United States marshals in the sale of property under execution *must* sell it in *strict conformity* to the state law, otherwise it is void and can confer no title whatever. *Smith* v. *Cockrell,* 6 Wall., 756 (L. ed., vol. 18, 973); *Boneman* v. *Norris,* 49 Fed. Rep., 438.

Statutes fixing the place of sale of lands under executions are *mandatory*, and *not* merely *directory;* and it is the *impera-*

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tive duty of officers to make such sales at the very place designated, and a sale made at any *other* place is not *voidable merely,* but absolutely *null* and *void.* The place of sale is the very *essence* of the sale, and strict compliance with the statute is absolutely essential in order to transfer a good title to realty. *Koch* v. *Bridges,* 45 Miss., 257; *Loudermilk* v. *Corpening,* 101 N. C., 649; *Sinclair* v. *Stanley,* 64 Tex., 67. In *Moody's Heirs* v. *Moeller* (Tex.), 13 Am. St. Rep., 839 (the Texas statute being the same as Mississippi's as to the place of sale), a United States marshal made the sale, not in front of the door of the *courthouse* of the *county,* but in front of the door of the *United States court* building, standing just on the opposite side of the street from the county courthouse. The court held that the sale was not simply and merely *voidable,* but was absolutely *void,* incapable of ratification and subject to a *collateral* attack, and that the acquiescence of the defendant in the execution in such a void judicial sale gave no validity to it.

It is, perhaps, proper in this connection to call attention to the allegation of the bill that the lots in controversy were, at the time of the sale, in fractional sec. 9, T. 8, R. 11, west, of *Hancock* county, though they are now, of course, situated in *Harrison* county, which was formed out of Hancock county in 1841.

The return of the marshal expressly recites that these lands were sold, not at the courthouse in the county of Hancock, where the land was then situated, but *"in Jackson."*

The law (which was *mandatory,* and *not* merely *directory*) made it the imperative duty of the marshal to sell the land at the *county courthouse* of the *county* where the land was situated, except where the defendant in execution should make a *written request* otherwise, in which event *only* was the marshal legally authorized or empowered to "change the sale of the property to the *place* where the *United States court* for the district is holden." The existence of this "written request" on the part of James McLaran, the defendant in the execution,

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was a necessary prerequisite and a condition precedent to the power of the marshal to sell this land "in *Jackson*" or at any place other than at the *courthouse* of *Hancock* county. It was the *sine qua non* of his authority. Without it he was, by the very provision and language of the statute, only "authorized to sell property at the courthouse in *each* county" where the land was situated. Being a condition precedent, and a *vital, jurisdictional* fact, his return must have shown and proved it. Its existence cannot be *presumed.* Only the writing proves it. Congress certainly would never have required not only that such a request be made, but that it should be a *written* request, if it had intended that it could be established by *presumptions* or *suppositions* or *inferences.* But even if it were permissible to indulge in vague presumptions in regard to *vital, jurisdictional* facts affecting the title to land, we think the presumptions which could be drawn from this record would all be against the existence of a "written request."

As stated, this same marshal or party made two separate and independent sales of land under this execution; and in his return as to the *first* sale (of lands other than those here involved), made October 7, 1839, he not only expressly recited that this *first* sale was made at the front door of the statehouse, in the city of Jackson, but also specifically recited that the "defendant had *consented* in writing that said sale should take place at Jackson;" and yet, although in his return as to the sale in *controversy,* made three weeks later, he sets out, or purports to set out, all of his acts as to this last sale, not one sentence or syllable is said as to the existence of any such written request, or of any character of request, of James McLaran that the land should be sold in "Jackson."

This return, setting out with great particularity the existence of the "written request," and all the facts as to *one* sale of certain *other* lands, and being noticeably and strangely silent as to the existence of any request relative to the sale of the land in question, would seem to be presumptive evidence of its non-

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existence. But even if we should presume or assume that there was a "written request," then the marshal only had authority, under the statutes cited, to change the sale of this land from the county courthouse "to the *place* where the *United States court* for the district is holden."

While the first sale is recited to have occurred in the city of Jackson at the front door of the statehouse, the second sale is merely recited to have occurred *"in Jackson,"* though the *bill* does aver that the sale occurred at the *front door of* the *statehouse in* Jackson.

In our opinion, the word "place," as used in the statute, did not mean *any* or *every* place in the town in which the court might be holden, but the *particular* place, the *special* house, in which the United States court held its sittings. Surely, the statute ought not to be construed to mean that the mere naming of the city in which the court sat and the sale of land anywhere within the broad limits of that city would sufficiently designate the "place" where it was held or be a strict compliance with the statute as to the sale of realty, and it nowhere appears either in the bill or exhibits that the statehouse in Jackson was, at the time of this sale, the *"place"* where the United States court was holden. *Hartley* v. *Cazye,* 38 Minn., 325.

Taking the pleadings as to all of these matters most strongly against the pleader, we hold that the marshal, instead of strictly conforming to the statutes in the sale of this land, palpably violated their plain provisions. While it is admitted that the bill and exhibits do not allege or show that the marshal executed a deed to John Martin, the alleged ancestor of complainants, or that he or they ever had a deed of any kind whatsoever to said land, or that any such deed ever existed, still able counsel for appellees contend (to use their own language) "that the bill alleges circumstances and facts from which the court is compelled to presume that a deed was made in this instance, after an interval of sixty years," inasmuch as it was the habit of said Martin to record his other deeds and as the bill alleges

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that the records of Hancock county were destroyed by fire in 1853 and that the records of the *judgments* of the United States court were taken away, lost, or destroyed in 1861 to 1865.

Even if the habit of John Martin to record his *other* deeds would be presumptive evidence in favor of the pleader (against whom the pleading must be taken most strongly) that this *particular* deed existed and was recorded (where the pleader fails to so allege), still we find nothing in this record to show that such was the habit of said Martin. As to the destruction of the records, while the bill alleges "that no part of the records of land can be found in the said county of Hancock or of Harrison, in which said lands were situated," yet it totally fails to show that any such deed was ever recorded on those records or that any such deed ever in fact existed. As a matter quite of course, if no such deed ever existed (and the pleader does not allege that it did), then it could never have been recorded on those records, and hence the allegation as to the records being destroyed becomes immaterial; at least we are not authorized, under the law, to presume therefrom that this particular deed was actually executed, and also that it was actually recorded thereon, and after thus creating one presumption in order to supply the facts whieh the pleader has failed to allege, then go a step further, and on this presumption raise and found another presumption, that all of the prerequisites and jurisdictional facts existed, authorizing the execution by the marshal of this very deed. However, it is further insisted that, after an interval of sixty years, the court should presume that this deed was actually executed, because in the first part of the bill it is alleged "that complainants' ancestor, John Martin, at the time of his death, in 1848, was seized and possessed in fee simple of these lands," and because the bill afterwards avers "that the defendant in the execution and the patentee of said lands *yielded up possession* of same after the sale of said lands on the 28th day of October, 1839."

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In our opinion, the first allegation just quoted must be construed to mean simply, merely, and only that *constructive* possession which the law imputes to the holder of the legal title, and not that John Martin even then (away back in 1848) was in the *actual* possession of said land. At best it was but the statement of the *legal conclusion* of the pleader, and not a statement of the *fact,* that said Martin was in truth in the *actual* possession thereof, and, therefore, it is not admitted by the demurrer. This same observation applies to other averments of the bill, many of which are merely *legal conclusions.*

It will be perceived that the second allegation just quoted merely says that the defendant in execution *"yielded up possession"* of these lands "after" their sale. It does not show *when* or *to whom* he "yielded up possession," whether to John Martin or to some one else, and, if to John Martin, *how long* this was *after* the sale. If it be said that this means *immediately* after the sale, in 1839, he "yielded possession," then how long did Martin remain in possession, and what *time,* and by *whom,* and *how,* was he dispossessed? Not one of these facts is alleged, nor is there a sufficiently distinct and positive allegation even that Martin or any one claiming under him was ever, at *any time,* in the actual possession of these lands, as *could* easily have been done, and as the rules of pleadings require *should* have been done, if they were facts and complainants desired to rely upon them.

Under elementary principles of law, requiring us to construe pleadings most strongly against the pleader, we do not feel authorized to supplement the pleadings with our suppositions or to supply the facts with our presumptions, and assume that a certain state of facts existed in favor of the pleader which he himself does not allege, in order to presume that a certain deed in his favor was duly and legally executed and delivered. On the contrary, after sixty years have elapsed since this sale, and when the complainants fail to aver that there was any deed duly executed, or that their ancestor ever took possession, or

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that he or they remained in possession (especially when they allege that *defendants* are now in possession), and when they rely *solely* and *merely* on the *return* of an officer under an execution, it would seem that if any presumptions should be indulged, it should be *against* the complainants *and against* the existence of the deed.

In the case of *Cooper* v. *Granberry*, 33 Miss., 117, the court said that "in the absence of a showing that his (complainant's) bid was consummated by a deed, it will be presumed after this lapse of time (fifteen years) that he transferred his bid or did some act renouncing it," holding also that a return on an execution does not transfer the *title*, but at most only gives a *right* to demand a *deed* conveying the *title*.

The case of *Normant* v. *Eureka Co.* (Ala.), 39 Am. St. Rep., 45, expressly holds that, before the court will presume that a deed was made by the officer, the purchaser must establish the fact that he not only *went* into possession under the sale, but *continued* in possession.

But even if this sale was a valid one, still we are clearly of the opinion that whatever rights complainants or John Martin may have acquired thereunder have been lost, and that they were barred by the statute of limitations when this suit was instituted on November 11, 1903, which was over sixty-four years after the sale occurred. Even if we could presume or infer from the allegations of the bill that John Martin went into possession and was in possession until his death, in 1848, still that was fifty-five years before complainants brought this suit to recover this land; and Code 1892, § 2731, requires "a person claiming land in equity" to bring his suit to recover same within the "period" of ten years after the right to recover it accrues, and this without regard to any question of adverse possession or whether the defendants have been in the adverse possession of the land or not. The adverse possession of defendant has nothing to do with the question or with the operation of this particular statute. A complainant has a right to

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bring his suit in *equity* for land whether he is in possession or not and whether defendant is in possession or not; and if he does not bring it within the period of ten years after his right of action in a court of *equity* accrues, he is barred. The provisions of sec. 2731 relate to a "*period*" of *time* within which suits to recover land may be brought by any one "claiming the same in equity." This sec. 2731, in our opinion, is in the nature of a statute of rest. The complainants here are "claiming this land in equity," and, not having brought their suit to recover within the "period" prescribed by sec. 2731, are clearly barred, unless the allegations of their bill bring them within the last clause thereof, which is as follows: "But in every case of a concealed fraud the right of any person to bring suit in equity for the recovery of land, of which he or any person through whom he claims may have been deprived by such fraud, shall be deemed to have first accrued at, and not before, the time at which the fraud shall, or with reasonable diligence might, have been first known or discovered."

The bill only avers in a general, vague, and indefinite way that "*after* the sale" (which was over sixty-four years ago) "*divers* persons" (without stating *who*) set about to cheat and defraud complainants out of the lands (without stating *how*). and that these divers persons combined and confederated to get possession and dispose thereof, and concealed and secreted so far as possible all facts of this sale from complainants, who have just of recent years learned the facts.

These allegations immediately follow the statement in the bill as to the purchase of the land by Martin in 1839; and, construing the pleadings most strongly against the pleader, it would seem that these "*divers* persons" must have set about *at once* to cheat and defraud, get possession of this land and dispose of it, or it may be that it was not until the more recent year of the death of Martin, in 1848, as his death is expressly alluded to in this same sentence and connection, and just before the charge of the combination and confederacy is set forth;

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and although this last date, even, was fifty-five years ago, yet complainants aver only in a *general* way that they learned of the facts just of "*recent* years," without stating how long they had known of it or what diligence they exercised in trying to discover it sooner.

To prevent this statute from beginning to run against them in favor of defendants, complainants must not only allege first fraud and the facts or acts constituting it; second, that these acts of fraud were committed by defendants or some one in privity with them; third, that they were concealed from complainants by defendants or their privies; fourth, that complainants did not discover or know of this fraud over ten years before instituting their suit; but, fifth, they must also allege and show that they exercised reasonable diligence to discover it sooner, or that they could not, with reasonable diligence, have discovered it sooner.

In our opinion, the bill in this case fails to sufficiently aver or show all or any of these necessary facts.

The bill does not disclose who the "divers persons" were who combined and confederated to cheat and defraud complainants and to conceal and secrete the facts; but the defendant, Jones, was hardly one of them, as the bill alleges that he was formerly of Buffalo, New York, but now of Gulfport, Miss., and the first connection that he or the other defendants had with these lands, so far as shown by the bill and exhibits, was in 1902. But, however this may be, the bill wholly fails to connect Jones or any of the defendants or their privies with these alleged acts of fraud, and this was absolutely necessary in order to prevent the running of the statute of limitations against complainants or to affect the rights of defendants. *Edwards* v. *Gibbs et al.*, 39 Miss., 166; *Fleming* v. *Grafton,* 54 Miss., 79.

In addition, the particular acts which constituted the fraud, combination, or confederacy are not alleged in the bill, but mere vague, indefinite, general, and uncertain averments are made.

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And no principle is more firmly settled or more familiar to the profession than that fraud will not be inferred or presumed, and cannot be charged in general terms, but that the specific and positive facts which constitute it must be distinctly and definitely averred, and it must be shown that defendants participated therein.

This doctrine is nowhere more clearly, concisely, and forcibly stated than by Judge Truly in the recent case of *Weir* v. *Jones,* 84 Miss., 602 (s.c., 36 South. Rep., 533, 534), where the decisions are collated and cited. It is too well established and too widely recognized to require a further citation of authorities.

This opinion has been extended beyond ordinary limits, but as this appeal was prosecuted to settle the principles of the cause for future guidance, not only in this suit, but in others now pending, we have deemed it necessary to sacrifice brevity in order to attempt to attain perspicuity, especially as, after a careful consideration of this record, we have found ourselves unable to concur with the learned chancellor in his conclusions. We think the demurrer ought to have been sustained.

The decree is reversed, the demurrer sustained, and cause remanded.

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INDEX.

ACCESSORY.

See PRINCIPAL AND ACCESSORY.

ACTIONS.

1. FORMS OF ACTION. *Tree cutting. Trespass quare clausum fregit. Assumpsit.*

A count in a declaration averring that defendant entered upon plaintiff's land and cut trees and carried them away, and demanding the value of the trees so cut and carried away, and another count in the same declaration, averring that defendant entered upon plaintiff's land and cut and carried away trees, whereby he became liable to pay plaintiff the value of said trees, and undertook and promised the plaintiff to pay him the value of said trees, are both *in assumpsit,* and not trespass *quare clausum fregit. West* v. *McClure,* 296.

2. LOCAL ACTIONS. *Transitory actions.*

An action of *assumpsit* to recover the value of trees cut by defendant on plaintiff's land is not local, but is a transitory action; and the proper court of Tennessee has jurisdiction of such an action for trees cut in this state, the defendant being there found and served with process. *Ib.*

ADVERSE POSSESSION.

1. ELEMENTS. *Code* 1892, §§ 2730, 2734.

The essential elements which are necessary to constitute an effective adverse possession are a hostile, actual, open, and notorious, exclusive and continuous occupancy for the (Code 1892, §§ 2730, 2734) statutory period. *McCaughn* v. *Young,* 277.

2. SAME. *Actual occupancy. Notice. Hostility.*

One in possession of land, holding under a trustee's deed purporting to convey title thereto, who notified the grantor in the deed of trust that he had purchased and held the land as owner, occupied in hostility to said grantor, although the trustee's sale at which he purchased was void because of some invalidating irregularity. *Ib.*

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ADVERSE POSSESSION — *Continued.*

3. ELEMENTS. *Wild land. Public acts of ownership.*

Actual occupation, cultivation, and residence are unnecessary to constitute actual possession, in the sense of being adverse to the true owner, where the land is so situate as not to admit of permanent, useful improvement, and the continued claim of possession is evidenced by public acts of ownership. *McCaughn* v. *Young*, 277.

4. SAME. *Payment of taxes. Cutting timber.*

One who, after receiving a deed to wild land not susceptible of occupancy, improvement, or cultivation, paid the taxes for a long term of years, during which the former owner neither paid taxes nor asserted any claim to the land, and used the timber from the land in the same way and to the same extent that he used timber from other lands belonging to him, with the knowledge of the former owner, and placed mortgages of record on the land, and offered the same for sale to the public, possessed the lands adversely to the former owner. *Ib.*

5. SAME. *Actual notice.*

A possession which is adverse and actually known to the true owner is equivalent to a possession which is open and notorious and adverse. *Ib.*

6. SAME. *Abandonment. Absence from state.*

The absence from the state of an adverse claimant of wild land does not constitute an abandonment by him of his possession, so as to break the continuity of the same, where such possession was open, notorious, and with the knowledge of the former owner, and under an instrument constituting color of title, and there was nothing to show an intention on his part to abandon the land, or a claim of title by the former owner during his absence. *Ib.*

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An affidavit not a part of the record cannot be considered by the supreme court in aid of the same. *Jenkins* v. *Barber*, 666.

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AMENDMENTS.

CHANCERY PRACTICE. *Striking answer from file. Defective affidavit. Leave to amend.*

Where an answer denied the equity of the bill, and was stricken from the files at a term of the court held before the expiration of the time for taking depositions in the case, because of technical defects in the affidavit to it, the defendant should have been granted leave to amend the affidavit, although not present in court and consequently did not ask for such leave. *Rootes* v. *Thomas,* 493.

APPEALS.

1. JUSTICES OF THE PEACE. *Bond. Code* 1892, § 82.

Parties against whom judgments have been rendered by justices of the peace are not to be deprived of an appeal to the circuit court, under Code 1892, § 82, regulating the subject, by the ignorance or arbitrary action of the justice of the peace in demanding an appeal bond in a greater penalty than that authorized by the statute. *Redus* v. *Gamble,* 165.

2. SAME. *Code* 1892, § 84. *Failure to send up record. Power of the circuit court.*

If a justice of the peace, from whose judgment an appeal has been taken, fail to send the record to the circuit court as required by Code 1892, § 84, prescribing his duties in such cases, the circuit court may issue the necessary writ to enforce performance of duty by the recusant justice of the peace. *Ib.*

3. SAME. *Code* 1892, § 89. *Certiorari.*

Such a writ, although commonly called a *certiorari,* is not a *certiorari* within the meaning of Code 1892, § 89, providing that all cases decided by a justice of the peace may be removed to the circuit court by writ of *certiorari* upon the terms therein specified. *Ib.*

4. SAME. *Bond not required. Trial de novo.*

Such a writ may be issued to enforce performance of duty by the recusant justice of the peace without the appellant giving any other than the appeal bond, and when performance of duty by the justice is enforced the trial will be *de novo.* *Ib.*

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APPEALS — *Continued.*

5. JUSTICE OF THE PEACE. *Record. Death of justice. Successor. Code* 1892, §§ 84, 2432.

Where a justice of the peace died after an appeal had been taken from his judgment, but before the record had been sent to the circuit court, and his administrator has complied with Code 1892, § 2432, providing that on the death of a justice of the peace his representative shall deliver his docket and papers to the clerk of the circuit court, who shall deliver them to the successor in office of the decedent, the appeal will not be dismissed although a term of the court has intervened between the death of the justice and the return of the record to the circuit court, and Code 1892, § 84, requires a justice of the peace in case of appeal to transmit the record to the circuit court on or before the next term thereof after the taking of the appeal. *Brennan* v. *Straas,* 341.

6. BOARD OF SUPERVISORS. *Void order.*

A void order of the board of supervisors, purporting to put the stock law in force in a part of the county, is not subject to a proceeding for its reconsideration, at a subsequent term of the board, so as to give the right of appeal from a refusal to vacate it. *Bowles* v. *Leflore County,* 387.

7. COUNTY. *Exemption from bond. Code* 1892, § 93. *Demurrer overruled. Code* 1892, § 33.

Where a county prayed for and obtained an appeal without bond, as authorized by Code 1892, § 93, from a decree overruling its demurrer to a bill in equity, under Code 1892, § 33, authorizing an appeal from such a decree, if applied for and perfected within a limited time, the appeal is perfected, within the statutory time limit, where a citation in error was sued out and served within such time. *Harrison County* v. *Rogers,* 578.

8. SAME. *Lapse of time. Motion to docket and dismiss. Failure of appellee to make.*

An appellee who has been served with a citation in error cannot, after the transcript of the record is filed in the supreme court, complain of the lapse of time less than will bar an appeal (two years, Code 1892, § 2752), between the taking of an appeal and the filing of the transcript in the supreme court, if he failed during such time to appear and move to docket and dismiss the cause. *Houston* v. *Witherspoon,* 68 Miss., 188. *Ib.*

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APPEALS — *Continued.*

9. SUPREME COURT. *Plea in bar. Statute of limitations. Code* 1892, § 2752.

A plea in bar of an appeal, based on the statute of limitations, Code 1892, § 2752, providing that appeals to the supreme court shall be prosecuted within two years next after the rendition of the judgment or decree complained of, may be filed in and passed upon by the supreme court. *Farmer* v. *Allen,* 672.

10. SAME. *Decree for sale of land. Erroneous description. Effect on pendency of suit.*

Where in a suit for the sale of lands a decree was rendered, purporting to be final, condemning the lands described in the bill to sale, but erroneously describing them by giving the wrong section number, the decree, while erroneous, is not void, and upon its rendition the suit ceased to be a pending one; and an appeal therefrom was, as to all persons not under disability, barred two years after its rendition. *Ib.*

ARGUMENT OF COUNSEL.

See CRIMINAL LAW, 35.

ARREST.

REWARDS. *Fleeing murderer. Code* 1892, § 1387. *Construction. Sheriff of another state. Legal duty.*

An Arkansas sheriff, arresting in that state a person who killed another in this state and who was fleeing before arrest, where he merely notified, by telegraph, the sheriff of the county in which the homicide was committed of the arrest, is not entitled to the reward provided for under Code 1892, § 1387, authorizing the payment of one hundred dollars out of the county treasury for the arrest and delivery up for trial of a fleeing homicide, because:

(*a*) He did not deliver up the prisoner for trial within the meaning of the statute; and

(*b*) He was under legal duty to have made the arrest. *Gould* v. *Chickasaw County,* 123.

ASSAULT.

1. MARSHAL. *Assault in making arrest.*

Although a village marshal may make an arrest without a warrant for an offense committed in his presence, he is liable on his official

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ASSAULT — *Continued.*

bond for damages resulting from a brutal and wanton assault in so making an arrest. *Carlisle* v. *Silver Creek,* 380.

2. ASSAULT WITH INTENT TO KILL. *Assault and battery with intent to kill. Code* 1892, § 967. *Instruction. Counts in indictment.*

Where a defendant was charged, under Code 1892, § 967, in one count with an assault with intent to kill and murder, and in another count of the same indictment with an assault and battery with like intent, and there was no evidence of the battery, it was error to instruct the jury, generally, that the want of such evidence was immaterial, drawing no distinction between the counts of the indictment. *Montgomery* v. *State,* 330.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

ATTACKING CREDITORS. *Election of remedies. Participation in assets.*

Creditors who unsuccessfully attacked a general assignment made by a corporation for the benefit of its creditors on the sole ground that it had not been duly executed are not thereby precluded from participating in the distribution of the assets. *Duncan* v. *Bank,* 681.

ATTEMPTS.

CRIMINAL LAW. *Forgery. Code* 1892, § 974.

The immaterial alteration of a draft does not constitute an attempt to forge. *Wilson* v. *State,* 687.

BLIND PASSENGER.

See RAILROADS.

BOARD OF SUPERVISORS.

1. CONSTITUTIONAL LAW. *Constitution* 1890, *sec.* 33. *Stock law. Code* 1892, §§ 2055-2059. *Statute. Operation on future contingency.*

The operation of a statute may be dependent upon a future contingency, without being unconstitutional, and §§ 2055-2059, Code 1892, providing for the establishment of stock-law districts by petition and vote, do not violate sec. 33, Constitution 1890, vesting the law-making power of the state in the legislature. *Ormand* v. *White,* 276.

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BOARD OF SUPERVISORS — *Continued.*

2. STOCK LAW. *Code* 1892, § 2056. *Petition. Entire county. Part of county.*

An order of the board of supervisors, made upon a petition to have the stock law put in force in the entire county, is utterly void where it purports to put the law in force in only part of the county, under Code, 1892, § 2056, regulating the subject. *Bowles* v. *Leflore County,* 387.

3. SAME. *Void order. Appeal.*

A void order of the board of supervisors, purporting to put the stock law in force in a part of the county, is not subject to a proceeding for its reconsideration, at a subsequent term of the board, so as to give the right of appeal from a refusal to vacate it. *Ib.*

4. SAME. *Judgment. Collateral attack. Constitution* 1890, *sec.* 259.

An order of the board of supervisors declaring the proposition for a removal of the county seat carried, from which no appeal was taken, may be collaterally attacked in a suit to restrain execution of the order, where the record of the board shows that its action was in excess of its jurisdiction because the proposition was not carried by a two-thirds vote of all the qualified electors in the county, as required by Constitution 1890, sec. 259, when the place to which the county seat is to be removed is a greater distance from the geographical center of the county than the place where it was already located. *Simpson County* v. *Buckley,* 713.

BONDS.

1. OFFICIAL BONDS. *Evidence. Code* 1892, §§ 1793-1797. *Municipalities.*

Under Code 1892, §§ 1793-1797, regulating the subject, in a suit upon the official bond of a village marshal, a copy of which was filed with the declaration, the copy of the bond so filed and the minute book of the municipality containing a record of the same is admissible in evidence in the absence of a plea denying its execution. *Carlisle* v. *Silver Creek,* 380.

2. SAME.

In such case it is competent to prove by the defendant that he held the official position in question and executed the bond sued upon as his official bond. *Ib.*

3. SAME. *Marshal. Assault in making arrest.*

Although a village marshal may make an arrest without a warrant for an offense committed in his presence, he is liable on his official bond for damages resulting from a brutal and wanton assault in so making an arrest. *Ib.*

See APPEALS, 1, 4, 7.

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BROKERS.

1. LAND BROKERS. *Commissions. Part payments.*

A broker's commissions for the sale of land are due and payable when the sale is completed, in the absence of an agreement extending the time for their payment, and not on collection of deferred purchase money payments. *Hancock* v. *Dodge,* 228.

2. SAME. *Contract for commissions. Statute of frauds. Code* 1892, § 4225, *par.* (*c*).

The statute of frauds in reference to oral agreements for the sale of interests in land, Code 1892, § 4225, par (c.), does not affect an agent's right to compensation for selling land pursuant to oral instructions. *Ib.*

BURGLARY.

CRIMINAL LAW. *Corpus delicti. Sufficiency of proof. Confession.*

Upon the trial of a defendant, indicted for burglary, testimony that the outer door of the house had been broken and the cash drawer therein opened, even in the absence of direct evidence that anything had been stolen, is a sufficient showing of an intent to steal and of the *corpus delicti* to authorize the admission in evidence of defendant's confession. *Brown* v. *State,* 27.

CRIMINAL LAW. *Ownership of premises.*

Actual possession of a house is the equivalent of a fee simple title as against a burglar, although the possession be wrongful as against the real owner. *Lewis* v. *State,* 35.

CAR SERVICE ASSOCIATIONS.

See RAILROADS, 20 to 38 inclusive.

CARRIERS.

See RAILROADS.

CATTLE GUARDS.

See RAILROADS, 12, 13, 39.

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CERTIORARI.

1. CODE 1892, § 89. *Certiorari.*

A writ issued from the circuit court requiring a justice of the peace to send up the record of a case tried by him, although commonly called *certiorari*, is not a *certiorari* within the meaning of Code 1892, § 89, providing that all cases decided by a justice of the peace may be removed to the circuit court by writ of *certiorari* upon the terms therein specified. *Redus* v. *Gamble*, 165.

2. THE RAILROAD COMMISSION.

The railroad commission is an inferior tribunal, within Code 1892, § 90, providing that *certiorari* may be had to review the judgments of all tribunals inferior to the circuit court, and *certiorari* lies to correct mistaken findings of fact by the commission induced by an error of law apparent on the record, the finding of a fact contrary to law, or the making of an order beyond its power, though sec. 89 confines the courts on *certiorari* to questions of law appearing on the face of the record. *Gulf, etc., R. Co.* v. *Adams*, 772.

CHANCERY COURT.

1. PRACTICE. *Waste. School lands, sixteenth section.*

A bill in equity to recover for waste committed by defendant on sixteenth section school lands, averring simply that the school authorities had leased the land, that the original lessee had assigned the lease, and that defendant held under it, is demurrable for a failure to show the term of the lease, when, where, by whom and to whom it was made. *Adams* v. *Griffin*, 1.

2. TAX TITLES. *Confirmation. Pleadings. Presumption.*

Where a bill for confirmation of a tax title alleges a valid sale of the land for taxes and exhibits as part thereof a tax deed in statutory form, which under the law is *prima facie* evidence of the validity of the assessment and sale, it cannot be assumed on demurrer that the assessment was made under the unconstitutional act of 1888 (Laws, p. 24), because the tax deed recites that the sale was for the taxes assessed for the year 1890. *Coffee* v. *Coleman*, 14.

3. PARTITION. *Parties.*

A decree confirming an amicable partition of land is invalid which ignores the rights of a joint owner, who was a defendant to the partition proceeding in which the decree was rendered and in no way assented to the allotment agreed to by the other parties. *Cotton* v. *Cash*, 29.

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CHANCERY COURT — *Continued.*

4. JURISDICTION. *Fraudulent conveyances. Code* 1892, § 503. *Lis pendens. Code* 1892, §§ 2782-2789.

The provision of Code 1892, § 503, enlarging the chancery court jurisdiction of bills by creditors to vacate fraudulent conveyances, that the creditor shall have a lien on the property from the filing of his bill, except as against *bona fide* purchasers before the service of process on the defendant, is not affected by Code 1892, §§ 2782-2789, the chapter on *lis pendens,* the two statutes referring to different classes of litigants. *Fernwood, etc., Co.* v. *Meehan-Rounds, etc., Co.,* 54.

5. SAME. *Practice. Process. Non-resident defendants. Code* 1892, § 3421. *When service complete.*

A non-resident defendant in chancery, under Code 1892, § 3421, regulating process by publication and mailing for such defendants, is not served with process so as to authorize proceedings against him as if personally served until the completion of the required publication, and, in case his post office be known, the proper mailing of a summons to him. *Ib.*

6. SAME. *Concrete case.*

Where, in a suit under Code 1892, § 503, to set aside a conveyance as fraudulent, a *lis pendens* notice was filed, under Code 1892, §§ 2782, 2789, but the grantee in the deed, a non-resident defendant, without actual notice of the suit, conveyed the property to a *bona fide* purchaser before the completion of the publication and mailing of process against him, under Code 1892, § 3421, the purchaser will be protected in his title. *Ib.*

7. INTERPLEADER. *Chancery practice. Injunction.*

Though relief by injunction be asked therein, a bill by debtors to ascertain to whom their debt should be paid is a bill of interpleader, and the rights of parties should be treated accordingly. *Quin* v. *Hart,* 71.

8. SAME. *Payment into court.*

A complainant in a bill of interpleader is not entitled to relief by injunction when he has paid nothing into court. *Ib.*

9. FEDERAL COURTS. *Removal of causes. Actions removable. Cancelling clouds on title.*

A suit to remove clouds from title to land is not within the exclusive jurisdiction of the state court, and may be removed, the citizenship of the parties justifying it, into the federal court. *Day* v. *Oatis,* 128.

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CHANCERY COURT — *Continued.*

10. FEDERAL COURTS. *Petition for removal. Demurrer.*

Where the complainant demurred to the defendant's petition to remove the cause to the federal court, he thereby admitted the truth of the petition, and cannot upon appeal justify a judgment denying the removal by reference to the evidence. *Day* v. *Oatis*, 128.

11. PRACTICE. *Waste. Co-tenants. Injunction.*

One tenant in common is entitled to an injunction against his co-tenants to restrain unusual and unreasonable waste, indicating malice and tending to destroy the chief value of the land. *Leatherbury* v. *McInnis*, 160.

12. SAME. *Limitation of injunction.*

Where one tenant in common has enjoined his co-tenant from destroying timber which covers the entire tract and costitutes its chief value, and there is no showing that the timber on one part of the tract is of more value than that on any other part, the injunction should be limited so as to restrain the defendant only from destroying more trees than such proportionate part thereof as corresponds with his interest in the land. *Ib.*

13. JURISDICTION. *Fraudulent conduct. Illegal contracts.*

A lender of money at extortionate rates of interest, under contracts which are void as against public policy, who establishes an agency for the carrying on of his nefarious business, cannot maintain a suit in equity against one who was placed by him in charge of such business for an accounting where he must call in the aid, directly or indirectly, of the illegal contracts to make out his case. *Woodson* v. *Hopkins*, 171.

14. CONSTITUTIONAL LAW. *Constitution* 1890, *sec.* 147. *Equity jurisdiction. Supreme court.*

The supreme court is forbidden by the terms of Constitution 1890, sec. 147, to reverse a decree of the chancery court because of any error or mistake as to whether the case in which it was rendered was of equity or common-law jurisdiction. *Hancock* v. *Dodge*, 228.

15. PRACTICE. *Striking answer from file. Defective affidavit. Leave to amend.*

Where an answer denied the equity of the bill, and was stricken from the files at a term of the court held before the expiration of the time for taking depositions in the case, because of technical defects in the affidavit to it, the defendant should have been granted leave to amend the affidavit, although not present in court and consequently did not ask for such leave. *Rootes* v. *Thomas*, 493.

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CHANCERY COURT — *Continued.*

16. NEW TRIAL. *Justice's judgment. Injunction.*

Where the plaintiff's attorney caused defendant's attorney to believe and act upon the idea that a case would not be tried at the next term of the justice's court, but would be continued, a judgment taken by the plaintiff himself, in the absence of the defendant and his attorney at said term, is fraudulent in its effect, and after the defendant, being without fault, has lost the right of appeal, will be enjoined and a new trial will be granted in equity, although the plaintiff's attorney acted without intent to deceive. *Gulf, etc., R. Co.* v. *Flowers,* 633.

17. PRACTICE. *Quieting title. Bill of complaint. Code* 1892, § 501.

A bill in equity to confirm title to real estate and to cancel and remove clouds therefrom is demurrable, if it fail to comply with Code 1892, § 501, providing that the complainant in such a bill must deraign his title, and that a mere statement that he is the real owner of the land shall be insufficient, unless good and valid reason be given for the failure. *Jackson* v. *Bank,* 645.

18. SAME. *Concrete case.*

Such a bill charging that the defendant had executed a deed of trust conveying the land as security for a debt, that default had been made in the payment of the debt, and that the deed of trust had been foreclosed and the lands purchased by complainant at the trustee's sale, does not comply with said statute, since it makes no reference to the trustee's deed and does not deraign the complainant's title, and gives no reason for the failure. *Ib.*

19. SOLICITORS IN CHANCERY. *Inconsistent positions.*

A defendant to an equity suit whose position is in fact adverse to that of another defendant cannot act as the latter's solicitor, unless, if at all, there be an express authorization placed of record for him to do so; and in the absence of such an authorization a decree rendered by consent of the solicitor defendant will be reversed on the appeal of his co-defendant for whom he assumed to act. *Jenkins* v. *Barber,* 666.

20. PARTITION SUIT. *Dismissal. Defendants' rights.*

Where defendants, because of an erroneous description of land in what was regarded for years as a final decree in a partition suit, seek to have the cause in which it was rendered treated as a pending one, and the complainant asks, in the event it be so treated, that the cause be dismissed, the defendants cannot complain of a decree purporting to dismiss it without prejudice to their rights to bring any other suit they may see proper. *Farmer* v. *Allen,* 672.

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CHANCERY COURT — *Continued.*

21. CLOUDS ON TITLE. *Bill to remove. Complainant's title. Code* 1892, § 500.

A complainant, to show that he is the "real owner," and therefore authorized under Code 1892, § 500, to maintain a bill to remove clouds from his title, must allege and show that he has a perfect legal or equitable title. *Jones* v. *Rogers,* 802.

22. EXECUTION SALE. *Description. Vicinity.*

An execution sale is void for insufficient description of the land in the return, it not showing in what county or state it was, but merely describing it as certain sections and fractional sections "lying on or near the seashore in the vicinity of Miss." *Ib.*

23. FEDERAL COURT. *Execution sale.*

Under Act Cong. May 19, 1828, ch. 68, secs. 3, 4 Stat., 281, providing that an execution on a judgment of a federal court and proceedings thereon shall be the same in each state as are now used in courts of such state; Act Cong. Feb. 16, 1839, ch. 27, secs. 4, 5 Stat., 317, providing that the marshal may, at the written request of defendant, change the sale of property in Mississippi to the place where the federal court for the district is held; and Act. Miss. June 22, 1822 (How. & H. Dig., p. 633), sec. 17, providing that sales of land shall be at the courthouse of the county—an execution sale by a marshal, on a judgment of a federal court, outside the county in which the land was situated, was void, unless it was at the place of holding the federal court of the district, and the return showed that it was on the "written request" of defendant. *Ib.*

24. SAME.

Neither the return on an execution that the execution sale by a marshal, on a judgment of a federal court, outside the county where the land was situated, was "in J.," nor the bill in a suit to remove clouds from title alleging that it was at the "front door of the statehouse in J.," shows that the sale was at the place authorized by Act Cong. Feb. 16, 1839, ch. 27, secs. 4, 5 Stat., 317, "the place where the United States court for the district is holden"—that is, the special house in which the federal court held its sittings. *Ib.*

25. DEED. *Presumption.*

Under the mere allegations of a bill to remove clouds from title that the marshal made execution sale of the land to complainants' ancestor, and that the land records of the county were destroyed, it cannot be presumed that the marshal executed a deed to the purchaser, and that it was recorded. *Ib.*

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CHANCERY COURT — *Continued.*

26. PLEADING. *Possession.*

The allegation of the bill to remove clouds from title that complainants' ancestor, under the execution sale to whom they claim, was at the time of his death seized and possessed in fee simple of the lands, is merely a legal conclusion, and a statement of constructive possession, not of actual possession. *Jones* v. *Rogers*, 802.

27. SAME.

The allegation of the bill to remove clouds from title, complainants claiming under an execution sale, that defendant in execution "yielded up possession" of the lands "after" the sale, is insufficient to show to whom or when possession was yielded, or that the purchaser, or any one claiming under him, ever had actual possession. *Ib.*

28. RETURN ON EXECUTION. *Deed.*

A return on an execution does not transfer title, but only gives a right to demand a deed conveying title.

29. SAME.

In the absence of a showing that one's bid at execution sale was consummated by deed, it will be presumed after sixty years that he renounced it. *Ib.*

30. SAME.

A deed to the purchaser at execution sale will not be presumed in the absence of a showing that he went into possession under the sale and continued in possession. *Ib.*

31. SAME.

Under Code 1892, § 2731, requiring a person "claiming land in equity" to bring his suit to recover it within ten years after the right to recover it accrues, it is immaterial whether or not defendants have been in adverse possession.

32. EQUITY. *Suits to recover land. Limitations. Code* 1892, § 2731.

The bill to remove cloud from title, complainants claiming under their ancestor, who died fifty-five years before, and through an execution sale made to him nine years before that, alleging that "after" such sale divers evil-disposed persons set about to cheat and defraud them of the lands, get possession and dispose thereof, and concealed as far as possible all the facts from complainants, who have just of "recent years" learned the facts, does not show that complainants have not had knowledge of the facts for ten years, or

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CHANCERY COURT — *Continued.*

have used diligence to discover them, so as to bring them within the exception to Code 1892, § 2731, providing a limitation of ten years from the accrual of the right of action for suits in equity to recover land. *Jones* v. *Rogers*, 802.

33. SAME. *Insufficient pleading.*

The exception to Code 1892, § 2731, requiring a suit in equity to recover lands to be brought within ten years of the accrual of the right to recover, that, in case of a concealed fraud, the right shall not be deemed to have accrued till the fraud shall, or with reasonable diligence might, have been discovered, does not extend the period of limitations against others than the parties to the fraud or their privies; so that a bill alleging merely that "divers persons" combined to defraud does not show a right to sue defendants after the ten years.

34. SAME.

To charge fraud, the specific facts constituting it must be distinctly and definitely averred. *Ib.*

CHARGING GRAND JURY.

See GRAND JURY.

CIRCUIT COURT.

1. STENOGRAPHERS. *Salary. Opening court. Pretermission of term. Code* 1892, § 4242.

An official stenographer, attending the opening of a term of the circuit court, and ready to perform his official duties, is entitled, under Code 1892, § 4242, regulating the subject, to one week's salary where the term was thereafter pretermitted, although the trial of no case was begun. *Wood* v. *Chickasaw County*, 120.

2. JUSTICE OF THE PEACE. *Appeals. Code* 1892, § 84. *Failure to send up record. Power of the circuit court.*

If a justice of the peace, from whose judgment an appeal has been taken, fail to send the record to the circuit court as required by Code 1892, § 84, prescribing his duties in such cases, the circuit court may issue the necessary writ to enforce performance of duty by the recusant justice of the peace. *Redus* v. *Gamble*, 165.

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CIRCUIT COURT—*Continued.*

3. CIRCUIT COURT. *Eminent domain. Special court. Meeting.*
The circuit court is without power to fix the time and place for the meeting of a special eminent domain court, and in awarding mandamus it should simply command the justice of the peace to convene the special court and proceed according to law. *Sullivan* v. *Yazoo, etc., R. Co.*, 649.

CLOUDS UPON TITLE.

See CHANCERY COURT.

CODE, HOWARD & HUTCHINSON'S.

P. 633. Executions. Place of sale. *Jones* v. *Rogers*, 802.

CODE, HUTCHINSON'S.

P. 668. Estates of decedents. Insolvency. Debts. Limitations. *Nutt* v. *Brandon*, 702.

CODE 1857.

Pp. 449, 450. Estates of decedents. Insolvency. Debts. Limitations. *Nutt* v. *Brandon*, 702.

CODE 1871.

§ § 2024, 2025. School funds. County treasurer. Warrants. *Tunica County* v. *Rhodes*, 500.

CODE 1880.

§ 2062. Estates of decedents. Insolvency. Debts. Limitations. *Nutt* v. *Brandon*, 702.

CODE 1892.

1. § 33. Appeal. County. Bond. *Harrison County* v. *Rogers*, 578.
2. § 82. Appeal. Bond. Justice of the peace. *Redus* v. *Gamble*, 165.
3. § 84. Justice of the peace. Appeal. Record. *Redus* v. *Gamble*, 165.
4. § 84. Justices of the peace. Appeals. Record. *Brennan* v. *Straas*, 341.
5. § 89. Justice of the peace. *Certiorari*. *Redus* v. *Gamble*, 165.

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Code, 1892.

CODE, 1892 — *Continued*.

6. §§ 89, 90. *Certiorari*. Railroad commission. *Gulf, etc., R. Co.* v. *Adams*, 772.
7. § 93. County. Appeal. Bond. *Harrison County* v. *Rogers*, 578.
8. § 500. Clouds upon title. Bill to remove. Deraignment. *Jones* v. *Rogers*, 802.
9. § 501. Clouds upon title. Deraignment of complainant's title. *Jackson* v. *Bank*, 645.
10. § 503. Fraudulent conveyances. Bill to set aside. *Lis pendens*. *Fernwood, etc., Co.* v. *Meehan-Rounds, etc., Co.*, 54.
11. § 732. Instructions. Filing. *Gulf, etc., R. Co.* v. *Boswell*, 313.
12. § 902. County treasurer. Failure to report. *Adams* v. *Coker*, 222.
13. § 967. Criminal law. Assault with intent to kill. *Montgomery* v. *State*, 330.
14. § 974. Criminal law. Attempts. Forgery. *Wilson* v. *State*, 687.
15. §§ 1026, 1027. Concealed weapons. Ordinance. Traveler. *Rosamon* v. *Okolona*, 583.
16. § 1106. Forgery. Immaterial alteration. *Wilson* v. *State*, 687.
17. § 1387. Fleeing murderer. Arrest. Reward. *Gould* v. *Chickasaw County*, 123.
18. § 1423. Criminal law. Jurors. Challenges. *Gammons* v. *State*, 103.
19. § 1425. Criminal law. Witness. Process. *Montgomery* v. *State*, 330.
20. § 1502. Crime. Definition. Conviction of witness. *Lewis* v. *State*, 35.
21. § 1680. Eminent domain. Justice of the peace. Mandamus. *Sullivan* v. *Yazoo, etc., R. Co.*, 649.
22. § 1746. Witness. Examination. Conviction of crime. *Lewis* v. *State*, 35.
23. §§ 1793, 1797. Municipalities. Marshal's bond. Execution. Suit. *Carlisle* v. *Silver Creek*, 380.
24. § 1797. Pleading. Character of plaintiff. Denial. *Thompson* v. *Bank*, 261.
25. § 1808. Railroads. Injury by train. Presumption of negligence. *New Orleans, etc., R. Co.* v. *Brooks*, 269.
26. § 1910. Probation of claims. Surviving partners. *Lance* v. *Calhoun*, 375.
27. § 1931. Surviving partners. Probation of claims. *Lance* v. *Calhoun*, 375.
28. § 1946. Estates of decedents. Limitations. Suits. *Nutt* v. *Brandon*, 702.
29. § 1983. Homestead. Conveyance. Non-joinder of wife. *Bolen* v. *Lilly*, 344.
30. § 2016. County treasurer. Commissions. Political year. *Adams* v. *Coker*, 222.

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CODE, 1892 — *Continued.*

31. § § 2055, 2059. Stock law districts. Supervisors. *Ormand* v. *White,* 276.

32. § 2056. Stock law. Part of county. *Bowles* v. *Leflore County,* 387.

33. § 2228. *Habeas corpus.* Discharge of accused. *Ex parte George Harris,* 4.

34. § 2294. Husband and wife. Conveyance. Pending suits. *Donoghue* v. *Shull,* 404.

35. § 2294. Husband and wife. Deed. Recordation. *Green* v. *Weems,* 566.

36. § 2354. Jurors. Competency. Challenge. *Lewis* v. *State,* 35.

37. § 2355. Jurors. Competency. Exclusion. *Lewis* v. *State,* 35.

38. § 2355. Criminal law. Jurors. Impartiality. *Gammons* v. *State,* 103.

39. § 2373. Grand jury. Charge. Intoxicants. *Fuller* v. *State,* 199.

40. § 2399. Process. Non-residents. *Comenitz* v. *Bank,* 662.

41. § 2432. Justice of the peace. Successor. Record. *Brennan* v. *Straas,* 341.

42. § 2462. Lien. Record. Renewal. Limitations. *Street* v. *Smith,* 359.

43. § § 2479. 2480. Deeds. Statutory form. *Allen* v. *Caffee,* 766.

44. § 2730. Limitations. Land. Adverse possession. *McCaughn* v. *Young,* 277.

45. § 2731. Limitations. Land. Suits in equity. *Jones* v. *Rogers,* 802.

46. § 2734. Limitations. Land. Adverse possession. *McCaughn* v. *Young,* 277.

47. § 2743. Limitations. Judgments. *Street* v. *Smith,* 359.

48. § 2752. Appeals. Limitation. *Farmer* v. *Allen,* 672.

49. § § 2782, 2789. *Lis pendens.* Fraudulent conveyances. *Fernwood, etc., Co.* v. *Meehan-Rounds, etc., Co.,* 54.

50. § 3401. Privilege taxes. Non-payment. Contracts. *North British, etc., Co.* v. *Edwards,* 322.

51. § 3421. Chancery court. Non-resident defendant. Publication. *Fernwood, etc., Co.* v. *Meehan-Rounds, etc., Co.,* 54.

52. § 3546. Railroads. Unlawful speed. *New Orleans, etc., R. Co.* v. *Brooks,* 269.

53. § 3561. Cattle guards. Federal constitution. *Yazoo, etc., R. Co.* v. *Harrington,* 366.

54. § 3561. Railroads. Cattle guards. Interior crossings. *Gulf, etc., R. Co.* v. *Ellis,* 586.

55. § 3877. Railroads. *Ad valorem* taxation. Franchises. *Gulf, etc., R. Co.* v. *Adams,* 772.

56. § 4225, par. (c). Statute of frauds. Land. Sale. *Welch* v. *Williams,* 301.

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CODE, 1892 — *Continued.*

57. § 4228. Husband and wife. Conveyance. Subsequent creditors. *Donoghue* v. *Shull,* 404.
58. § 4229. Statute of frauds. Sales. Cipher telegrams. *Bonds* v. *Lipton Co.,* 209.
59. § 4234. Frauds. Property used in business. Sign. *Dale* v. *Harahan,* 49.
60. § 4242. Stenographer. Salary. *Wood* v. *Chickasaw County,* 120.
61. § 4326. Telegraphic message. Transmission. Penalty for delay. *Hilley* v. *Telegraph Co.,* 67.
62. § 4437. Trusts and combines. Car service association. Demurrage. *Yazoo, etc., R. Co.* v. *Searles,* 520.

COMMISSIONS.

See BROKERS.

CONCEALED WEAPONS.

CRIMINAL LAW. *Traveler. Code* 1892, §§ 1026, 1027. *Okolona ordinance.*

A person ceases to be a traveler, within the meaning of a city ordinance, substantially the same as Code 1892, §§ 1026, 1027, making it a misdemeanor to carry a deadly weapon concealed, but excepting those traveling, etc., when he reaches the point of his destination and engages a room at a boarding house or hotel, intending to stay an indefinite time and to return home only after the business for which he made the journey is completed. *Rosamon* v. *Okolona,* 583.

CONFESSIONS.

CRIMINAL LAW. *Burglary. Corpus delicti. Sufficiency of proof.*

Upon the trial of a defendant, indicted for burglary, testimony that the outer door of the house had been broken and the cash drawer therein opened, even in the absence of direct evidence that anything had been stolen, is a sufficient showing of an intent to steal and of the *corpus delicti* to authorize the admission in evidence of defendant's confession. *Brown* v. *State,* 27.

CONSPIRACY.

CRIMINAL LAW. *Murder. Instruction.*

The principle that where parties combine to commit crime the law imputes the guilt of each to all thus engaged and holds all to be

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CONSPIRACY — *Continued.*

guilty of any crime committed by either in the execution of the common purpose is founded upon the idea that a common intent to do some unlawful act existed in the minds of the parties prior to the commission of the crime which results from the combination; hence an instruction which seeks to apply the principle in the absence of evidence of such common intent to do an unlawful act is erroneous. *Sullivan* v. *State,* 149.

CONSTITUTION 1890.

1. Sec. 17. Special assessments. Sidewalks. *Wilsinski* v. *Greenville,* 393.
2. Sec. 33. Legislative power. Boards of supervisors. Stock law. *Ormand* v. *White,* 276.
3. Sec. 97. Revival of remedy. Legislature. Prohibition. *North British, etc., Co.* v. *Edwards,* 322.
4. Sec. 147. Equity jurisdiction. Reversal. *Hancock* v. *Dodge,* 228.

CONSTITUTION UNITED STATES.

Const. U. S. Fourteenth amendment. Cattle guards. Code 1892, § 5561. Due process of law. *Yazoo, etc., R. Co.* v. *Harrington,* 366.

CONSTITUTIONAL LAW.

1. CONSTITUTION 1890, SEC. 147. *Equity jurisdiction. Supreme court.*

The supreme court is forbidden by the terms of Const. 1890, sec. 147, to reverse a decree of the chancery court because of any error or mistake as to whether the case in which it was rendered was of equity or common law jurisdiction. *Hancock* v. *Dodge,* 228.

2. CONSTITUTION 1890, SEC. 33. *Stock law. Code* 1892, §§ 2055-2059. *Statute. Operation on future contingency.*

The operation of a statute may be dependent upon a future contingency, without being unconstitutional, and §§ 2055-2059, Code 1892, providing for the establishment of stock law districts by petition and vote, do not violate sec. 33, Const. 1890, vesting the law-making power of the state in the legislature. *Ormand* v. *White,* 276.

3. CONSTITUTION 1890, SEC. 97. *Reviving barred remedy. Contractual limitation.*

Constitution 1890, sec. 97, prohibiting the legislature to revive any remedy which may have been barred by lapse of time, or by any statute of limitation of this state, has no application to the terms

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CONSTITUTIONAL LAW—*Continued.*

of a contract by which the parties agree that an action shall not be brought thereon after a specified time, but relates wholly to such limitation of time in which suits may be brought as is recognized by the law of the state. *North British, etc., Co.* v. *Edwards,* 322.

4. PRIVILEGE TAXES. *Delinquency. Disability to sue. Code* 1892, § 3401. *Amnesty act. Laws* 1904, *ch.* 75, *p.* 57.

Parties who were disabled to maintain suits, under Code 1892, § 3401, because of delinquency in the payment of privilege taxes, could avail of the amnesty act of 1904 (Laws 1904, ch. 75, p. 57), and remove such disability where suit was pending when the act was passed, although the contract of fire insurance sued upon provided that no suit could be maintained upon it unless instituted within one year from the fire and more than a year had elapsed between the date of the fire and passage of the amnesty act. *Ib.*

5. CONSTITUTION 1890, SEC. 17. *Municipalities. Special assessments. Front-foot rule.*

A municipality may, by legislative authority, charge the costs of paving a sidewalk as a lien on abutting lots of different owners, according to the front-foot rule, and so to do is not a taking of private property for public use without compensation. *Wilzinski* v. *Greenville,* 393.

6. U. S. CONST., XIV. AMENDMENT. *Code* 1892, § 3561. *Cattle guards. Due process of law.*

Code 1892, § 3561, requiring railroads to maintain cattle guards where their tracks pass through enclosed land, is not violative of the fourteenth amendment to the constitution of the United States as depriving the companies of property without due process of law. *Yazoo, etc., R. Co.* v. *Harrington,* 366.

CONTINUANCE.

1. CRIMINAL LAW. *Supreme court practice. Record not aided by evidence aliunde.*

The supreme court, on appeal in a criminal case, in passing upon the action of the trial court in denying a continuance, is confined to the record and cannot consider a certified copy of a subpœna issued for a witness nor an affidavit averring that he was present in court during the trial of the case, such papers not having been of record in the court below at the time of the trial. *Whit* v. *State,* 308.

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CONTINUANCE — *Continued.*

2. CRIMINAL LAW. *Continuance. Absent witness. Compulsory process.*
Under Code 1892, § 1425, regulating the subject, where a defendant in a criminal case had not had opportunity to obtain compulsory process for a witness on account of whose absence he desired a continuance, and the facts which he expected to prove by him were material to the defense, and such process would probably have secured his presence, it was error not to have continued the case or postponed it to another day, although the prosecuting attorney admitted that the witness, if present, would have testified as shown in the affidavit. *Montgomery* v. *State,* 330.

3. CRIMINAL LAW. *Continuance. Absent witness. Admission of what witness will testify.*
Where a witness. on account of whose absence a continuance in a criminal case was asked, was shown by the record to have been duly subpœnaed, and to live a short distance from the courthouse, and to be too sick to attend the trial, and these facts were not contested by the state, and the testimony of the witness was material, the trial should have been postponed until the attendance of the witness could have been procured, although the prosecuting attorney admitted that the witness, if present, would testify as stated in the application. *Caldwell* v. *State,* 383.

CONTRACTS.

1. LANDLORD AND TENANT. *Laborer. Share-cropper. Violation of contract. Laws 1900, p. 140, ch. 101. Criminal law.*
Laws 1900, p. 140, ch. 101, making it a misdemeanor for any laborer, renter, or share-cropper, who has contracted with another person in writing for a specified time, not exceeding one year, to leave his employer or the leased premises before the expiration of his contract, without the consent of his employer or landlord, and make a second contract without giving notice of the first one to the second party, is not violated by a person, under such first contract, who merely obtained money from his employer or landlord on pretense of going to certain places on business, and who left the premises of his employer or landlord and did not return. *Ex parte George Harris,* 4.

2. EQUITY. *Jurisdiction. Fraudulent contract. Illegal contracts.*
A lender of money at extortionate rates of interest, under contracts which are void as against public policy, who establishes an agency for the carrying on of his nefarious business, cannot maintain a

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CONTRACTS — *Continued.*

suit in equity against one who was placed by him in charge of such business for an accounting where he must call in the aid, directly or indirectly, of the illegal contracts to make out his case. *Woodson* v. *Hopkins*, 171.

3. CONSTITUTIONAL LAW. *Constitution* 1890, *sec.* 97. *Reviving barred remedy. Contractual limitation.*

Constitution 1890, sec. 97, prohibiting the legislature to revive any remedy which may have been barred by lapse of time, or by any statute of limitation of this state, has no application to the terms of a contract by which the parties agree that an action shall not be brought thereon after a specified time, but relates wholly to such limitation of time in which suits may be brought as is recognized by the law of the state. *North British, etc., Co.* v. *Edwards*, 322.

4. PRIVILEGE TAXES. *Delinquency. Disability to sue. Code* 1892, § 3401. *Amnesty act. Laws* 1904, *ch.* 75, *p.* 57.

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5. EVIDENCE. *Writing. Parol.*

The terms of a written contract cannot be varied or enlarged by parol. *Hightower* v. *Henry*, 476.

6. SAME. *Concrete case.*

A duly executed writing in these words, "On or before November 15th, next after date, I promise to pay to the order of Hightower & Cassity three hundred and sixty dollars, rent for ninety acres land at four dollars per acre, of Laban plantation, for the year 1901. Value received," is not only a promissory note, but a contract which cannot be varied by parol evidence showing an agreement on the part of the payees and landlords to put a fence around the leased premises. *Ib.*

7. MUNICIPALITIES. *Water supply. Estoppel. Laws* 1886, *ch.* 325, *p.* 589. *Rescission of contract.*

Where a city, acting under a statute (Laws 1886, ch. 325, p. 589), empowering it to contract alone for pure and wholesome water,

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CONTRACTS — *Continued.*

contracted with a water company for a supply of such water, it is not estopped to complain:

(*a*) That the specific water furnished by the company after its plant had been put in operation was not pure and wholesome, although, pending the negotiations which led to the contract, the city accepted samples of the water which the company proposed to furnish, and the water furnished was like the samples; nor

(*b*) That the water company used a reservoir from which the city was furnished impure and unwholesome water, although the contract contemplated that the water should be furnished from a reservoir of the kind so used. *Waterworks Co.* v. *Meridian,* 515.

8. SAME. *Pure and wholesome water.*

A contract requiring the party contracted with to furnish "pure and wholesome water" certainly required the water to be furnished to be reasonably pure and wholesome, whether it was required to be perfectly pure or not. *Ib.*

9. SAME. *Fire protection.*

Where a contract to supply a city with water required the party contracted with to furnish first-class fire protection, the fact that the different sizes of pipe that might be used in constructing the plant were mentioned in the contract did not limit the obligation of the party contracted with to furnish first-class fire protection, nor preclude the city from complaining that the pipes actually laid in pursuance of the contract did not afford first-class protection. *Ib.*

10. SAME. *Extensions of plant.*

Where a city had instituted proceedings to cancel a contract with a water company, the former's act in allowing or even in ordering additions and improvements to be made after suit was brought did not estop it from prosecuting the proceedings; but the water company, in making improvements with notice of the pendency of the proceedings, acted as a volunteer. *Ib.*

CORPORATIONS.

1. CORPORATIONS. *Sale of franchise. Purchaser. Want of legislative power. Stockholders.*

Where a corporation, being authorized to sell, sells its franchise to another corporation, the stockholders of the seller cannot avoid the sale because of the want of power in the purchaser to buy. *Hinds, etc., Counties* v. *Natchez, etc., R. Co.,* 599.

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CORPORATIONS — *Continued.*

2. CORPORATIONS. *Railroads. Laws* 1890, *ch.* 502, *p.* 675. *Natchez, Jackson & Columbus Railroad Company. Power to sell.*

The Natchez, Jackson & Columbus Railroad Company was empowered, under Laws 1890, ch. 502, p. 675, to sell its railroad franchises and property by a vote of a majority of its stockholders without the consent of the minority. *Hinds, etc., Counties* v. *Natchez, etc., R. Co.*, 599.

3. SAME. *Stockholders. Power of majority. Sale.*

A private corporation, doing an unprofitable business, may sell its entire assets upon a vote of the majority of the stockholders, even in the absence of an express enabling statute; and with such a statute the majority may sell all of the assets of ar insolvent public corporation. *Ib.*

4. SAME. *Counties. Consenting to sale of stock.*

A county which owned a majority of the stock of a railroad for eleven years, and, with another county, controlled the road for five years longer, and which was represented by the president of its board of supervisors at every meeting of the stockholders during the entire period, and participated, through its representative, in the issuance, hypothecation, and sale of stock to a certain person, could not question the validity of the stock so issued, in the hands of its holders. *Ib.*

5. SAME. *Meetings. Minority bound by acts of majority.*

A stockholder in a corporation is bound by the act of a majority where due notice of a stockholders' meeting was given, although he was absent and unrepresented at the meeting.

6. SAME. *Counties. Railway stocks. Non-governmental capacity.*

Counties which issue bonds for railway stock do not own and hold the stock in a governmental capacity, but hold it in the same way and subject to the same rights and obligations as private corporations and individuals. *Ib.*

7. SAME. *County appointing director. Estoppel.*

A county which holds stock in a railroad under a contract of subscription, giving it the right to be represented in the directorate, and which appoints a representative to act as director, is bound by the action of its representative in participating at a directors' meeting in a sale of the corporation's franchise and assets, and is estopped to repudiate such action. *Ib.*

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CORPORATIONS — *Continued.*

8. INSOLVENCY. *Receiver. Laborer's wages. Preference claims.*

Where a receiver is appointed for an insolvent corporation, whether public or private, and its entire property is placed in his hands, he will be required to pay the wages of laborers who rendered service shortly before his appointment and whose labor was necessary to continue the business of the corporation and preserve its property, in preference to both ordinary and mortgage creditors. *LeHote* v. *Boyet,* 636.

9. ASSIGNMENT FOR BENEFIT OF CREDITORS. *Attack. Election of remedies. Participation in assets.*

Creditors who unsuccessfully attacked a general assignment made by a corporation for the benefit of its creditors on the sole ground that it had not been duly executed are not thereby precluded from participating in the distribution of the assets. *Duncan* v. *Bank,* 681.

COUNTIES.

1. APPEAL. *Exemption from bond. Code* 1892, § 93. *Demurrer overruled. Code* 1892, § 33.

Where a county prayed for and obtained an appeal without bond, as authorized by Code 1892, § 93; from a decree overruling its demurrer to a bill in equity, under Code 1892, § 33, authorizing an appeal from such a decree, if applied for and perfected within a limited time, the appeal is perfected, within the statutory time limit, where a citation in error was sued out and served within such time. *Harrison County* v. *Rogers,* 578.

2. SAME. *Lapse of time. Motion to docket and dismiss. Failure of appellee to make.*

An appellee who has been served with a citation in error cannot, after the transcript of the record is filed in the supreme court, complain of the lapse of time less than will bar an appeal (two years, Code 1892, § 2752), between the taking of an appeal and the filing of the transcript in the supreme court, if he failed during such time to appear and move to docket and dismiss the cause. *Houston* v. *Witherspoon,* 68 Miss., 188. *Ib.*

3. STOCKHOLDER. *Railway company. Consenting to sale of stock.*

A county which owned a majority of the stock of a railroad for eleven years, and, with another county, controlled the road for five years longer, and which was represented by the president of its board of supervisors at every meeting of the stockholders during the entire period, and participated, through its representative, in

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COUNTIES — *Continued.*

the issuance, hypothecation, and sale of stock to a certain person, could not question the validity of the stock so issued, in the hands of its holder. *Hinds, etc., Counties* v. *Natchez, etc., R. Co.,* 599.

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A stockholder in a corporation is bound by the act of a majority where due notice of a stockholders' meeting was given, although he was absent and unrepresented at the meeting. *Ib.*

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A county which holds stock in a railroad under a contract of subscription, giving it the right to be represented in the directorate, and which appoints a representative to act as director, is bound by the action of its representative in participating at a directors' meeting in a sale of the corporation's franchise and assets, and is estopped to repudiate such action. *Ib.*

COUNTY SEAT.

1. REMOVAL. *Injunction. Compromise decree. Res adjudicata.*

A decree dismissing a suit to restrain the removal of a county seat, resulting from a compromise, is not a bar to a similar suit by other persons not parties nor privies to, nor consulted in, the previous suit. *Simpson County* v. *Buckley,* 713.

2. SAME. *Board of supervisors. Judgment of. Collateral attack. Constitution* 1890, *sec.* 259.

An order of the board of supervisors declaring the proposition for a removal of the county seat carried, from which no appeal was taken, may be collaterally attacked in a suit to restrain execution of the order, where the record of the board shows that its action was in excess of its jurisdiction because the proposition was not carried by a two-thirds vote of all the qualified electors in the county, as required by Constitution 1890, sec. 259, when the place to which the county seat is to be removed is a greater distance from the geographical center of the county than the place where it was already located. *Ib.*

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COUNTY SEAT—*Continued.*

3. REMOVAL. *Evidence. Number of voters.*

Evidence is admissible to show the number of names remaining on the registration books of the county, after all proper erasures, on a contest as to whether the removal of a county seat was carried at an election on the subject by the requisite majority of all the qualified voters of the county. *Simpson County* v. *Buckley*, 713.

4. SAME. *Simpson county election. Laws* 1900, *ch.* 149, *p.* 201.

The county seat of Simpson county was not removed from Westville to Edna, now Mendenhall, by the election held under Laws 1900, ch. 149, p. 201. *Ib.*

COUNTY TREASURER.

1. SCHOOL FUNDS. *Warrants. School directors. Orders. Code* 1871, § 2024.

Under Code 1871, § 2024, providing that the county treasurer shall not pay warrants drawn on school moneys unless they have been issued by order of the board of school directors, it is necessary to sustain a warrant issued thereunder, alleged to have been drawn pursuant to a lost order of the board, to prove not only that an order for the warrant had existed, but its contents as well. *Tunica County* v. *Rhodes*, 500.

2. SAME. *Specification of use. Code* 1871, § 2025. *Mandamus.*

Under Code 1871, § 2025, providing that all orders upon the county treasurer for the payment of school moneys shall specify not only the fund upon which they were drawn, but the specific use to which the money was to be applied, school warrants issued thereunder which fail to specify the specific use to which the money was to be applied are void, and mandamus will not lie to enforce the levy of a tax for their payment. *Ib.*

3. FAILURE TO REPORT. *Code* 1892, § 902.

A county treasurer is not liable to the penalty for failure to make reports to the board of supervisors, as required by Code 1892, § 902, where the failure was not caused by an unwillingness or default on his part, but resulted from a request by the members of the board to postpone the making of them. *Adams* v. *Coker*, 222.

4. SAME. *Commissions. Code* 1892, § 2016. *Political year.*

A county treasurer's commissions should be estimated on the basis of the political year, beginning the first of January and ending the thirty-first of December, and not on the basis of the fiscal year, beginning the first of October and ending the thirtieth of September. *Ib.*

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CRIMINAL LAW AND PROCEDURE.

1. LANDLORD AND TENANT. *Laborer. Share-cropper. Violation of contract. Laws* 1900, *p.* 140, *ch.* 101.

   Laws 1900, p. 140, ch. 101, making it a misdemeanor for any laborer, renter, or share-cropper, who has contracted with another person in writing for a specified time, not exceeding one year, to leave his employer or the leased premises before the expiration of his contract, without the consent of his employer or landlord, and make a second contract without giving notice of the first one to the second party, is not violated by a person, under such first contract, who merely obtained money from his employer or landlord on pretense of going to certain places on business, and who left the premises of his employer or landlord and did not return. *Ex parte George Harris,* 4.

2. SAME. *Habeas corpus. Discharge of relator. Code* 1892, § 2228.

   A relator who has been arrested upon an affidavit, purporting to be predicated of said statute (Laws 1900, p. 140, ch. 101), which charges no offense, should be discharged upon *habeas corpus,* notwithstanding Code 1892, § 2228, providing that a person shall not be discharged on *habeas corpus* because of invalid proceedings if he ought to be held for any crime alleged against him, where it is not made manifest that he has been guilty of some crime. *Ib.*

3. BURGLARY. *Corpus delicti. Sufficiency of proof. Confession.*

   Upon the trial of a defendant, indicted for burglary, testimony that the outer door of the house had been broken and the cash drawer therein opened, even in the absence of direct evidence that anything had been stolen, is a sufficient showing of an intent to steal and of the *corpus delicti* to authorize the admission in evidence of defendant's confession. *Brown* v. *State,* 27.

4. WITNESSES. *Credibility. Conviction of crime. Code* 1892, § 1502. *Code* 1892, § 1746.

   The examination of a witness touching his conviction of a crime may extend to misdemeanors as well as to felonies, under Code 1892, § 1746, authorizing the examination of any witness as to his conviction of crime, and Code 1892, § 1502, defining "crime" as used in any statute to mean any violation of law liable to punishment by criminal prosecution. *Lewis* v. *State,* 35.

5. SAME. *Criminal law. Co-defendants.*

   The objection of a defendant upon trial for crime to the competency as a witness of one jointly indicted with him, especially after a *nolle prosequi* has been entered as to the witness, is without merit, since the witness alone can object to being examined. *Ib.*

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CRIMINAL LAW AND PROCEDURE — *Continued.*

6. JURORS. *Competency. Code* 1892, § 2355. *Exclusion. Review.*

An appellant cannot predicate error of the action of the trial court in excluding a proffered juror from the panel of its own motion, under Code 1892, § 2355, providing that any juror shall be excluded if the court be of opinion that he cannot try the case impartially, and the exclusion shall not be assignable as error; nor can error be predicated of the action of the trial court in sustaining a challenge on the ground that there is a criminal case pending against the challenged juror. (See last sentence, Code 1892, § 2354, amended Laws 1894, p. 60.) *Lewis* v. *State*, 35.

7. BURGLARY. *Ownership of premises.*

Actual possession of a house is the equivalent of a fee simple title as against a burglar, although the possession be wrongful as against the real owner. *Ib.*

8. TRIALS. *Retirement of jury.*

It is not error for the jury to be retired pending argument to the court on the competency of a witness. *Ib.*

9. HOMICIDE. *Murder. Principal and accessories.*

One who aids, assists, and encourages a murder is a principal, and not an accessory; and his guilt in no wise depends upon the guilt or innocence, the conviction or acquittal, of any other alleged participant in the crime. *Dean* v. *State*, 40.

10. SAME. *Instruction. Designating killing as murder.*

If it be unquestionable that a murder was committed, and the only inquiry be as to the identity of the criminal, reversible error cannot be predicated of an instruction because it refers to the crime as murder. *Ib.*

11. SAME. *Evidence.*

In a trial for murder, committed as a result of a conspiracy to rob the deceased, the admission of testimony tending to show that money was in the decedent's house before the murder and not there afterwards, and that decedent's wife was murdered and the house burned during the same night the deceased was killed, is not reversible error. *Ib.*

12. MURDER. *Jurors. Voir dire examination. Reasonable doubt.*

A man's conception of a reasonable doubt is not a proper subject of inquiry when he is presented as a juror in a criminal case and examined on his *voir dire*. *Fugate* v. *State*, 86.

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CRIMINAL LAW AND PROCEDURE—*Continued.*

13. MURDER. *Estimate of witness.*

Whether a proffered juror would believe a certain witness for the state on oath is not a proper subject of inquiry upon his *voir dire* examination in a criminal case. *Fugate* v. *State*, 86.

14. SAME. *Evidence. Witnesses differing.*

Where testimony touching a certain conversation with the accused, unquestionably relating to the deceased, is otherwise competent, it is not rendered inadmissible in evidence because the witnesses fail to corroborate each other in some particulars concerning it. *Ib.*

15. SAME. *Theories. Duty of jury.*

The rule that where there are two reasonable theories as to the facts of a killing, one favorable and the other unfavorable to the accused, the jury are bound to accept the favorable one, only applies in case the jury be in doubt as to the correctness of the unfavorable one. *Ib.*

16. SAME. *Instructions. Modifications. Harmless error.*

Where the court instructed the jury in a murder case to the effect that the accused was presumed to be innocent, and that the presumption was an instrument of proof whereby his innocence was established until sufficient evidence should be introduced to overcome it, the erroneous modification of another part of the instruction, charging that the presumption of innocence is not merely a presumption of law, but is evidence in behalf of the accused, by striking out the word "evidence" and inserting "presumption," does not constitute reversible error. *Ib.*

17. WRIT OF ERROR CORAM NOBIS. *Bias of jurors.*

Where a proper case is made for a writ of error *coram nobis* it will lie in either a criminal or civil case, there being no statute to forbid; but the writ cannot be invoked in a criminal case for the purpose of annulling a final judgment of conviction by showing that one or more of the jurors were prejudiced against defendant and corruptly qualified for the purpose of convicting him. *Fugate* v. *State*, 94.

18. REWARDS. *Fleeing murderer. Code 1892, § 1387. Construction. Sheriff of another state. Legal duty.*

An Arkansas sheriff, arresting in that state a person who killed another in this state and who was fleeing before arrest, where he merely notified, by telegraph, the sheriff of the county in which the homicide was committed of the arrest, is not entitled to the reward provided for under Code 1892, § 1387, authorizing the payment of one hundred dollars out of the county treasury for the arrest and delivery up for trial of a fleeing homicide, because:

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CRIMINAL LAW AND PROCEDURE — *Continued.*

(*a*) He did not deliver up the prisoner for trial within the meaning of the statute; and

(*b*) He was under legal duty to have made the arrest. *Gould* v. *Chickasaw County,* 123.

19. JURORS. *Code* 1892, § 2355. *Impartiality. Insanity.*

Under Code 1892, § 2355, providing that a juror shall not be disqualified because he has an opinion as to the guilt or innocence of the accused, if it shall appear to the satisfaction of the court that he has no bias of feeling or prejudice in the case and no desire to reach any result in it except that to which the evidence may conduct, a conviction will not be reversed:

(*a*) Because a juror was adjudged competent who testified on his *voir dire* that he had read of the case; had heard rumors, but had never heard any of the witnesses; that he had an opinion from what he had heard which would require evidence to remove; that, though he had such opinion, he could give defendant a fair trial, because the opinion was based on what he had heard and read, and he had heard none of the particulars; that he had no bias or prejudice against defendant and would try him fairly and impartially on the evidence to be introduced; that he had no prejudice against the plea of insanity, and if the evidence caused him to have a doubt he thought he could give defendant its benefit; nor

(*b*) Because another juror was adjudged competent who testified on his *voir dire* that he had no bias or prejudice against defendant, and would give him a fair and impartial trial on the evidence; that he had heard nothing from any one who personally knew, but had formed and expressed an opinion from what he had seen in the newspapers; that this opinion would require testimony to remove, but testimony would remove it; that he would go into the jury box "as free as I believe it is possible for a human mind to be;" that he could not say but that he had a prejudice against the defense of insanity, but that he would give defendant the benefit of all reasonable doubt; that it would depend upon the nature of the insanity as to what effect it would have on his decision, but he would give defendant the benefit of it if it arose from disease which he had contracted from cigarette smoking or from heredity; that in his judgment a man was not entitled to the plea of momentary insanity if his condition at the time of the homicide arose from drunkenness or from brooding over his relations with deceased; that he could give defendant the benefit of all reasonable doubt as to his guilt, whether that doubt was raised by the question of insanity or not. *Gammons* v. *State,* 103.

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CRIMINAL LAW AND PROCEDURE — *Continued.*

20. JURORS. *Challenges. Code* 1892, § 1423.

Under Code 1892, § 1423, providing that the accused shall have presented to him a full panel before being called upon to make his peremptory challenges, a defendant should withhold all peremptory challenges until a full panel is presented, and not interpose such a challenge on the overruling of his challenge for cause while the panel is incomplete. If a defendant challenges a juror peremptorily, being advised by the court that he need not do so while the panel is incomplete, he cannot complain that a full panel was not presented to him before he was called upon to make such challenges. *Gammons* v. *State*, 103.

21. MURDER. *Conspiracy. Instruction.*

The principle that where parties combine to commit crime the law imputes the guilt of each to all thus engaged and holds all to be guilty of any crime committed by either in the execution of the common purpose is founded upon the idea that a common intent to do some unlawful act existed in the minds of the parties prior to the commission of the crime which results from the combination; hence an instruction which seeks to apply the principle in the absence of evidence of such common intent to do an unlawful act is erroneous. *Sullivan* v. *State*, 149.

22. SAME. *Self-defense.*

Where in a murder case the defense is not predicated of self-defense it is erroneous to give an instruction to the effect that self-defense can only be availed of under certain circumstances of which there was no evidence. *Ib.*

23. SAME.

On prosecution for murder in a difficulty between deceased and defendant and his son, an instruction authorizing conviction if the son killed deceased, not in necessary self-defense, if defendant aided in such killing, though deceased provoked the difficulty with defendant or the son, provided deceased was fighting with his hands only, was erroneous. *Ib.*

24. CHARGE TO GRAND JURY. *Code* 1892, § 2373. *Unlawful sale of intoxicants. Indictment. Quashed.*

Although the statute, Code 1892, § 2373, requires the circuit judge to charge the grand jury touching its duty, and requires him especially to give in charge the statute against the unlawful sale of intoxicants, it is improper for the judge, directly or indirectly, to designate a particular individual as making such sales. If he does so, and the individual be indicted for the crime, the indictment, on seasonable motion, will be quashed. *Fuller* v. *State*, 199.

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CRIMINAL LAW AND PROCEDURE—*Continued.*

25. CHARGE TO GRAND JURY. *Judicial indiscretion.*

A conviction for the unlawful sale of intoxicants will be reversed if, on overruling defendant's application for a continuance, the trial judge, in the presence of jurors, announce that there has been much complaint about the failure to convict "these criminals," and that the court feared it was largely due to continuances. *Fuller* v. *State*, 199.

26. SUPREME COURT PRACTICE. *Record not aided by evidence aliunde.*

The supreme court, on appeal in a criminal case, in passing upon the action of the trial court in denying a continuance, is confined to the record and cannot consider a certified copy of a subpœna issued for a witness nor an affidavit averring that he was present in court during the trial of the case, such papers not having been of record in the court below at the time of the trial. *Whit* v. *State*, 208.

27. CONTINUANCE. *Absent witness. Compulsory process.*

Under Code 1892, § 1425, regulating the subject, where a defendant in a criminal case had not had opportunity to obtain compulsory process for a witness on account of whose absence he desired a continuance, and the facts which he expected to prove by him were material to the defense, and such process would probably have secured his presence, it was error not to have continued the case, or postponed it to another day, although the prosecuting attorney admitted that the witness, if present, would have testified as shown in the affidavit. *Montgomery* v. *State*, 330.

28. SAME. *Assault with intent to kill. Assault and battery with intent to kill. Code* 1892, § 967. *Instruction. Counts in indictment.*

Where a defendant was charged, under Code 1892, § 967, in one count with an assault with intent to kill and murder, and in another count of the same indictment with an assault and battery with like intent, and there was no evidence of the battery, it was error to instruct the jury, generally, that the want of such evidence was immaterial, drawing no distinction between the counts of the indictment. *Ib.*

29. SAME. *Practice. Time of granting instructions.*

The proper time for granting instructions is after the close of the evidence and before the argument of the case. While the court has the right to grant an instruction at any time before the jury retires, it should not be done after argument is commenced, except on rare and emergent occasions and with opportunity to the other party to prepare and request counter charges. *Ib.*

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CRIMINAL LAW AND PROCEDURE — *Continued.*

30. CONTINUANCE.

The procuring of an instruction in a criminal case from the court during the argument for defendant, whose counsel had no notice thereof until it was produced for the first time during the closing argument for the state, was error, though on objection the state's attorney offered to permit defendant's counsel then to answer it. *Montgomery* v. *State*, 330.

31. INTOXICANTS. *Unlawful sale. Evidence. Tricks.*

The sale of a ticket, representing intoxicating liquor, so arranged that as each bottle of liquor might be delivered a hole could be punched in the ticket to show the fact and the subsequent delivery of one or more bottles of liquor to the holder of the ticket, upon its presentation and punching, is a sale of liquor so delivered, although the money was paid by the purchaser when he received the ticket. *Harper* v. *State*, 338.

32. CONTINUANCE. *Absent witness. Admission of what witness will testify.*

Where a witness, on account of whose absence a continuance in a criminal case was asked, was shown by the record to have been duly subpœnaed, and to live a short distance from the courthouse, and to be too sick to attend the trial, and these facts were not contested by the state, and the testimony of the witness was material, the trial should have been postponed until the attendance of the witness could have been procured, although the prosecuting attorney admitted that the witness, if present, would testify as stated in the application. *Caldwell* v. *State*, 383.

33. MURDER. *Evidence. Error in admitting. Exclusion. Curative effect.*

The vital question in a prosecution for murder being whether defendant or deceased was the aggressor, and the evidence on the subject sharply conflicting, the error of admitting hearsay evidence to the effect that defendant had threatened deceased was not cured by its subsequent exclusion, with direction to the jury to disregard it. *Davis* v. *State*, 416.

34. SAME. *Witnesses. Impeachment. Collateral matters. Relevancy.*

The defendant in a murder case and his wife having testified that she did not, after the killing, say to him in the presence of third persons, "If you had listened to me, you would not have gone down there and the man would not have been killed," it was error to allow the state to contradict them, since their testimony on the subject related to a collateral and irrelevant matter. *Ib.*

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Criminal law and procedure.

35. MURDER. *Argument to jury. Reading parts of the testimony.*

In a prosecution for crime the district attorney should not be permitted to read to the jury portions of the testimony as written out by the official stenographer. *Davis* v. *State*, 416.

36. SAME. *Previous difficulty. Evidence.*

Where on the trial of a murder case the state designedly proved a previous difficulty between deceased and the accused, it was error to deny defendant the right to show the details of such difficulty. *Brown* v. *State*, 511.

37. SAME. *Supreme court practice.*

In such case, upon appeal, the state cannot claim that the error is non-prejudicial because the record fails to show what the details of the previous difficulty were, where it does show that defendant was not permitted to state to the trial court, even out of the hearing of the jury, what he expected to prove touching the details. *Ib.*

38. CARRYING CONCEALED WEAPONS. *Traveler. Code* 1892, §§ 1026, 1027. *Okolona ordinance.*

A person ceases to be a traveler, within the meaning of a city ordinance, substantially the same as Code 1892, §§ 1026, 1027, making it a misdemeanor to carry a deadly weapon concealed, but excepting those traveling, etc., when he reaches the point of his destination and engages a room at a boarding house or hotel, intending to stay an indefinite time and to return home only after the business for which he made the journey is completed. *Rosamon* v. *Okolona*, 583.

39. MURDER. *Evidence. Other crime. Identity of crime.*

Where, upon the trial of a murder case, the theory of the state being that defendant procured another to kill deceased, it appeared that the deceased had recently slain the brother of the accused, the trial court did not err in permitting the state to prove that the defendant had thereafter tried to hire a witness to kill deceased and, admitting his malice toward him, expressed his determination to have him killed. Such proof is not incompetent as being evidence of another crime, but is relevant and admissible. *Johnson* v. *State*. 572.

40. SAME. *Instruction.*

In such case an instruction, authorizing the conviction of defendant "if he counseled, procured, or commanded the killing of deceased," does not constitute reversible error, where it was shown by the record of the conviction of the person who did the killing that he pleaded guilty to the charge of murder and there was no doubt or dispute as to the decedent having been murdered. *Ib.*

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CRIMINAL LAW AND PROCEDURE — *Continued.*

41. MURDER. *Case.*

Facts examined and adjudged sufficient to support a conviction of murder. *Johnson* v. *State*, 572.

42. EVIDENCE. *Direct evidence in rebuttal.*

In homicide, after the defense has rested, it is error to admit testimony for the state which is not in rebuttal of that for the defendant, but direct, in the absence of a showing that it came to the state's knowledge after the conclusion of its evidence. *Flowers* v. *State*, 591.

43. SAME. *District attorney as witness. Practice.*

In homicide it is error to permit a district attorney, who has been improperly allowed to introduce the direct testimony of a witness offered in rebuttal, to fortify the testimony of such witness by that of himself in relation to and explanatory of previous statements made by the witness; and such error is not cured by the subsequent exclusion of the district attorney's testimony. *Ib.*

44. SAME. *Right of defendant. Unfair restrictions.*

It is error in homicide, after improperly admitting in rebuttal direct testimony for the state as to dying declarations, to exclude testimony for the defense in conflict therewith. *Ib.*

45. FORGERY. *Immaterial alteration. Code* 1892, § 1106.

Under Code 1892, § 1106, defining forgery and confining the crime to instances where any person may be affected, bound, or in any way injured in his person or property, the mere alteration of the figures, following the character "$," in the upper right-hand corner of a draft, changing "$2.50" to "$12.50," does not constitute forgery where in the body of the instrument the sum ordered paid was distinctly written "two and 50-100 dollars," and this is especially true where the paper upon which the draft was written had distinctly stamped upon its face the words "Ten Dollars or Less," since the alteration was of an immaterial part of the instrument and could not injure any one. *Wilson* v. *State*, 687.

46. SAME. *Attempt. Code* 1892, § 974.

Nor do the facts above stated constitute an attempt to forge, under Code 1892, § 974, forbidding conviction of an attempt to commit a crime when it shall appear that the crime intended or the offense attempted was perpetrated, since the writing of the figure "1" between the "$" and the "2.50" was fully accomplished and no other effort or intent is shown or suggested. *Ib.*

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CRIMINAL LAW AND PROCEDURE — *Continued.*

47. HOMICIDE. *Evidence. Boasting.*

Testimony is admissible in a murder case to show statements made by the accused, several hours after the killing, boasting of the deed. *Cook* v. *State,* 738.

48. SAME. *Co-defendant. Previous conviction of crime.*

It is not competent in a murder case to show that defendant's brother, who participated in the killing and had been indicted therefor, had been convicted of crime two years before in a municipal court then presided over by the deceased, where the evidence showed that the killing arose out of the occasion, without reference to any previous trouble. *Ib.*

49. SAME. *Witnesses. Code* 1892, § 1746.

Under Code 1892, § 1746, authorizing the interrogation of witnesses as to whether they have been convicted of crime, in order to determine their credibility, testimony of a conviction cannot be given by others until the witness has first denied the same. *Ib.*

50. SAME. *Instruction. Assumption of fact.*

Where at the time deceased picked up a weapon the defendant was being securely held by two men, and therefore unable to make an attack, an instruction which assumes that the deceased picked up the weapon to defend himself from an assault by defendant is erroneous. *Ib.*

51. SAME. *Murder or manslaughter. Question for jury.*

Whether a defendant was guilty of murder or of manslaughter should be left to the determination of the jury, although the evidence shows an unpremeditated killing by defendant's brother in response to the request of defendant, who had just been engaged in a fight, and was being held by two men, confronted by deceased armed with a stick to attack some one, when he made the request. *Ib.*

52. SAME. *Presumptions of innocence.*

All persons are presumed to be absolutely innocent of a crime charged against them, in its entirety, and in all its material parts, until the jury finds to the contrary on proper instructions, based on competent and relevant testimony. *Ib.*

CROPS, GROWING.

See DAMAGES, 5.

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CUSTOM.

1. MASTER AND SERVANT. *Evidence.*

In an action for death of a servant by the falling of a bridge timber, refusal to permit defendant to introduce evidence as to the custom in lowering such timbers was error. *Alabama, etc., R. Co.* v. *Overstreet*, 78.

2. SALES. *Breach of contract.*

Where meat contracted for was "smoked meat," it is immaterial that the meat sold upon breach of contract by the seller for the purchaser's account was not smoked, it being shown that the meat was sold to be shipped on the buyer's order, that "smoking" is a process to which meat is submitted, according to the custom of the trade, only immediately prior to shipment, and that the buyer failed to give shipping directions. *Bonds* v. *Lipton Co.*, 209.

DAMAGES.

1. RAILROAD EMPLOYE. *Fatal injury. Future prospects.*

Where, in an action for death, there was no evidence as to decedent's prospects for the future, or as to his expectancy of life, a charge authorizing the jury, on the issue of damages, to consider deceased's physical condition at the time of his death, the wages he was then earning, and his future prospects, and the probable length of his life, was error. *Alabama, etc., R. Co.* v. *Overstreet*, 78.

2. RAILROADS. *Blind passengers.*

If a carrier, with knowledge or reasonable ground to believe that the applicant is in fact able to travel alone, without requiring extra care or attention, arbitrarily, willfully, wantonly, wrongfully, and unreasonably deny him transportation, the carrier will be liable to him for compensatory damages and, in the discretion of the jury, to punitive damages; and the reasonableness or unreasonableness of an agent's refusal to sell him a ticket, after explanation of his ability to travel alone, is a question for the jury to determine. *Illinois, etc., R. Co.* v. *Smith*, 349.

3. EXCESSIVE VERDICT.

A judgment on a verdict in excess of the damages proved will be affirmed by the supreme court only on condition of appellees remitting the excess. *Wagner* v. *Ellis*, 422.

4. CLAIMANT'S FAULT IN PART.

Where it appeared that a part of the damages claimed was caused by claimant's own wrong, he should not be awarded anything in the absence of all evidence showing the extent of the damages so caused. *Hightower* v. *Henry*, 476.

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DAMAGES — *Continued.*

5. GROWING CROP. *Destruction.*

If a growing crop be destroyed, a jury may estimate, with the aid of testimony, its value at the time of its destruction, in view of all the circumstances, existing at any time before the trial, favoring or rendering doubtful the conclusion that it would have matured, and of all the hazards and expenses incident to the process of growth, although it cannot be shown with absolute certainty that, but for its destruction, it would have matured. *Yazoo, etc., R. Co.* v. *Hubbard,* 480.

6. EXEMPLARY. *When not recoverable.*

A telephone company is not subjected to liability for exemplary damages by the acts of its manager in removing the telephone from the residence of a patron and requiring him, in sending long-distance messages, to prepay charges and send them from the exchange, when such patron, on the claim of poor service, had refused to pay full rental for his residence telephone, in the absence of evidence of wanton, oppressive, insulting, or willful conduct on the part of the manager. *Cumberland, etc., Co.* v. *Baker,* 486.

7. EMINENT DOMAIN. *Levee damages.*

A judgment for damages for land taken and damaged for levee purposes will not be disturbed on the ground that it is excessive, when a judgment for a much larger sum might have been given under the evidence. *Levee Commrs.* v. *Yazoo, etc., R. Co.,* 508.

8. SAME. *Harmless error.*

The fact that one witness who testified favorably for the defendant was incompetent affords no ground for setting aside a judgment awarding defendant a certain sum as damages on condemnation of his land for levee purposes, when the judgment is fully sustained by competent evidence. *Ib.*

DEDICATION.

See ROADS AND STREETS.

DEEDS.

1. HOMESTEAD. *Conveyance. Code* 1892, § 1983. *Non-joinder of wife. Warranty. Estoppel.*

The conveyance of a homestead, or any part of it, by the husband while living with his wife without her joining him in the deed, is not valid or binding, under Code 1892, § 1983, so providing, and a warranty clause does not create an estoppel against the maker of the deed, even after the death of his wife. *Bolen* v. *Lilly,* 344.

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DEEDS — *Continued.*

2. LACHES. *Cancellation of deeds. Duress.*

A complainant in a bill to cancel a conveyance for alleged fraud and duress who delays bringing the proceeding for nearly seven years after the date of the instrument, and who receives in the meantime four annual payments of the purchase money, is barred by laches. *Horn* v. *Beatty*, 504.

3. SAME. *Case.*

A decree canceling a conveyance for fraud and duress is not justified by evidence showing that two years after complainant acquired the half interest in the property constituting the subject of the conveyance, and seventeen years before the filing of the bill, a mineral deposit of alleged medicinal value was discovered on the land, that during several years three different agencies attempted to exploit the sale of the mineral, but failed, and that it was not until long after complainant had conveyed his half interest to his partner, under a proposition to buy or sell at a given price, that the mineral was found to be valuable. *Ib.*

4. HUSBAND AND WIFE. *Conveyances. Code* 1892, § 2294. *Creditors.*

A conveyance executed for value and in good faith by a husband to his wife cannot be avoided by a creditor of the husband whose debt was unsecured at the time, under Code 1892, § 2294, providing that a conveyance between husband and wife shall not be valid as against a third person unless it be filed for record, where it was filed for record before the creditor obtained a lien. *Green* v. *Weems*, 566.

5. CONDITION SUBSEQUENT. *Forfeiture. Nonuser.*

A deed conveying land to trustees of a township for school purposes, and for no other use, is not forfeited by a nonuser for two and one-half years, even if the deed be assumed to be upon a condition subsequent. *Buck* v. *Macon*, 580.

6. DESCRIPTION. *Plats. Field notes. Grantee's rights.*

A deed to lands, describing the same as being certain designated lots of a survey shown by a plat recorded in the record of deeds of the county, conveys the land as shown by the plat, irrespective of "field notes." *Haley* v. *Martin*, 698.

7. WARRANT. *Construction. Code* 1892, §§ 2479, 2480.

Under Code 1892, §§ 2479, 2480, giving a form of a deed, using the words, "I convey and warrant," etc., and providing that it shall be effectual to transfer right, title, claim, and possession, and that

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DEEDS — *Continued.*

the word "warrant" in a deed shall constitute a covenant that the grantor will forever warrant and defend the title, the word "warrant" constitutes a warranty of the possession as well as of the title. *Allen* v. *Caffee*, 766.

DEEDS OF TRUST.

1. TRUSTEE'S POWER. *Sale. Departure from terms of deed.*

If a trustee fail in any material particular, in making a sale under a deed of trust, to follow the terms of sale prescribed in the deed, the sale will be invalid. *McCaughn* v. *Young*, 277.

2. SAME. *Burden of proof. Presumption. Recitals in trustee's deed.*

The power of sale being shown to be in the trustee, his subsequent sale under the deed of trust is presumed to have been lawfully made, although the deed from him fails to recite the power under which he acted, or that he complied with the conditions of sale prescribed in the deed of trust; and the burden of proof to show invalidating irregularity is upon the party denying the validity of the trustee's sale. *Ib.*

DEMURRAGE.

See RAILROADS.

DESCRIPTION.

See DEEDS, 6; EXECUTIONS, 1.

DISTRICT ATTORNEY.

See CRIMINAL LAW, 35, 43.

DURESS.

LACHES. *Cancellation of deeds.*

A complainant in a bill to cancel a conveyance for alleged fraud and duress who delays bringing the proceeding for nearly seven years after the date of the instrument, and who receives in the meantime four annual payments of the purchase money, is barred by laches. *Horn* v. *Beatty*, 504.

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ELECTIONS.

1. NUMBER OF VOTERS. *Evidence.*

Evidence is admissible to show the number of names remaining on the registration books of the county, after all proper erasures, on a contest as to whether the removal of a county seat was carried at an election on the subject by the requisite majority of all the qualified voters of the county. *Simpson County* v. *Buckley*, 713.

2. SAME. *Simpson county election. Laws* 1900, *ch.* 149, *p.* 201.

The county seat of Simpson county was not removed from Westville to Edna, now Mendenhall, by the election held under Laws 1900, ch. 149, p. 201. *Ib.*

EMINENT DOMAIN.

1. LEVEE DAMAGES.

A judgment for damages for land taken and damaged for levee purposes will not be disturbed on the ground that it is excessive, when a judgment for a much larger sum might have been given under the evidence. *Levee Commrs.* v. *Yazoo, etc., R. Co.*, 508.

2. SAME. *Harmless error.*

The fact that one witness who testified favorably for the defendant was incompetent affords no ground for setting aside a judgment awarding defendant a certain sum as damages on condemnation of his land for levee purposes, when the judgment is fully sustained by competent evidence. *Ib.*

3. SAME. *Evidence. Use to which land is applied. Steamboat landing.*

Evidence of the value of the land in question as a steamboat landing is competent in a proceeding to condemn land for levee purposes. *Ib.*

4. SPECIAL COURT. *Justice of the peace. Code* 1892, § 1680. *Mandamus.*

In presiding over a special court of eminent domain, created by Code 1892, § 1680, the justice of the peace acts ministerially rather than judicially, and he may be controlled by mandamus. *Sullivan* v. *Yazoo, etc., R. Co.*, 649.

5. SAME. *Jurisdiction of circuit court. Meeting of eminent domain court. Time and place.*

The circuit court is, however, without power to fix the time and place for the meeting of the eminent domain court, and in awarding mandamus it should simply command the justice of the peace to reconvene the special court and proceed according to law. *Ib.*

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EMINENT DOMAIN — *Continued.*

6. SPECIAL COURT. *Former proceeding. Res adjudicata.*

A railroad company, having the right to condemn private property for public use, is not precluded from so doing by the fact that a former proceeding to condemn the same land had been dismissed by the justice of the peace, and that a petition for mandamus to require the justice of the peace to proceed in the cause, filed in the name of the state on the relation of the attorney-general, for the railroad's benefit, had been dismissed on demurrer in the circuit court. *Sullivan* v. *Yazoo, etc., R. Co.*, 649.

EQUITY.

See CHANCERY COURT.

ESTATES OF DECEDENTS.

1. SURVIVING PARTNERS. *Probation of claims. Code* 1892, § 1931.

Code 1892, § 1931, forbidding executors and administrators paying unprobated claims, has no application to a surviving partner administering partnership assets. *Lance* v. *Calhoun*, 375.

2. SAME. *Code* 1892, § 1910 *et seq.*

The fact that a surviving partner is indebted to the estate of his deceased partner does not preclude him from administering the partnership estate as authorized by Code 1892, § 1910 *et seq.*

3. INSOLVENCY. *Suits against. Statute of limitation.*

There was no statute of Mississippi after the code of 1857 became operative, November 1, 1857, and before the code of 1880 went into effect, November 1, 1880, prohibiting suits upon debts due from the insolvent estate of a decedent, although there was such a statute both before (Laws 1821, p. 72; Hutchinson's Code, p. 668) and afterwards (Code 1880, § 2062; Code 1892, § 1946); hence the statutes of limitation against such debts were not suspended during said period of time by the decree of insolvency. *Nutt* v. *Brandon*, 702.

ESTOPPEL.

1. HOMESTEAD. *Conveyance. Code* 1892, § 1983. *Non-joinder of wife. Warranty.*

The conveyance of a homestead, or any part of it, by the husband while living with his wife without her joining him in the deed, is not valid or binding, under Code 1892, § 1983, so providing, and a warranty clause does not create an estoppel against the maker of the deed, even after the death of his wife. *Bolen* v. *Lilly*, 344.

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ESTOPPEL — *Continued.*

2. MUNICIPALITIES. *Contracts. Water supply. Laws* 1886, *ch.* 325, *p.* 589. *Rescission of contract.*

Where a city, acting under a statute (Laws 1886, ch. 325, p. 589), empowering it to contract alone for pure and wholesome water, contracted with a water company for a supply of such water, it is not estopped to complain:

(*a*) That the specific water furnished by the company after its plant had been put in operation was not pure and wholesome, although, pending the negotiations which led to the contract, the city accepted samples of the water which the company proposed to furnish, and the water furnished was like the samples; nor

(*b*) That the water company used a reservoir from which the city was furnished impure and unwholesome water, although the contract contemplated that the water should be furnished from a reservoir of the kind so used. *Waterworks Co.* v. *Meridian,* 515.

3. RAILWAY STOCK. *Sale of assets. Assent by county.*

A county which holds stock in a railroad under a contract of subscription, giving it the right to be represented in the directorate, and which appoints a representative to act as director, is bound by the action of its representative in participating at a directors' meeting in a sale of the corporation's franchise and assets, and is estopped to repudiate such action. *Hinds, etc., Counties* v. *Natchez, etc., R. Co.,* 599.

4. RES ADJUDICATA. *Sale of chattel. Warranty. Suit for price.*

Where the seller sued for the price of a chattel and the buyer pleaded a breach of warranty in defense, a judgment in plaintiff's favor will bar any subsequent action by the buyer for a breach of the warranty. *Miller* v. *Buckley,* 706.

5. COUNTY SEAT. *Removal. Injunction. Compromise decree. Res adjudicata.*

A decree dismissing a suit to restrain the removal of a county seat, resulting from a compromise, is not a bar to a similar suit by other persons not parties nor privies to, nor consulted in, the previous suit. *Simpson County* v. *Buckley,* 713.

EVIDENCE.

1. CONSPIRACY. *Murder. Accompanying crimes.*

In a trial for murder, committed as a result of a conspiracy to rob the deceased, the admission of testimony tending to show that

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EVIDENCE — *Continued.*

money was in the decedent's house before the murder and not there afterwards, and that decedent's wife was murdered and the house burned during the same night the deceased was killed, is not reversible error. *Dean* v. *State,* 40.

2. CRIMINAL LAW. *Supreme court practice. Record not aided by aliunde.*

The supreme court, on appeal in a criminal case, in passing upon the action of the trial court in denying a continuance, is confined to the record and cannot consider a certified copy of a subpœna issued for a witness nor an affidavit averring that he was present in court during the trial of the case, such papers not having been of record in the court below at the time of the trial. *Whit* v. *State,* 208.

3. SAME. *Harmless error.*

The erroneous admission in evidence of copies of telegrams is not ground for reversal of a judgment predicated of a contract which the copies were intended to establish, if the contract be otherwise fully proved by competent and undisputed evidence. *Bonds* v. *Lipton Co.,* 209.

4. INTOXICANTS. *Unlawful sale. Tricks.*

The sale of a ticket, representing intoxicating liquor, so arranged that as each bottle of liquor might be delivered a hole could be punched in the ticket to show the fact, and the subsequent delivery of one or more bottles of liquor to the holder of the ticket, upon its presentation and punching, is a sale of liquor so delivered, although the money was paid by the purchaser when he received the ticket. *Harper* v. *State,* 338.

5. OFFICIAL BONDS. *Code* 1892, §§ 1793, 1797. *Municipalities.*

Under Code 1892, §§ 1793, 1797, regulating the subject, in a suit upon the official bond of a village marshal, a copy of which was filed with the declaration, the copy of the bond so filed and the minute book of the municipality containing a record of the same is admissible in evidence in the absence of a plea denying its execution. *Carlisle* v. *Silver Creek,* 380.

6. SAME.

In such case it is competent to prove by the defendant that he held the official position in question and executed the bond sued upon as his official bond. *Ib.*

7. CRIMINAL LAW. *Murder. Error in admitting. Exclusion. Curative effect.*

The vital question in a prosecution for murder being whether defendant or deceased was the aggressor, and the evidence on the subject

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EVIDENCE — *Continued.*

sharply conflicting, the error of admitting hearsay evidence to the effect that defendant had threatened deceased was not cured by its subsequent exclusion, with direction to the jury to disregard it. *Davis* v. *State,* 416.

8. CRIMINAL LAW. *Argument to jury. Reading parts of the testimony.*
In a prosecution for crime the district attorney should not be permitted to read to the jury portions of the testimony as written out by the official stenographer. *Ib.*

9. OBJECTIONS. *Supreme court practice.*
Unless objection be made in the trial court to the proof of the contents of a writing by parol evidence, complaint thereof in the supreme court will be unavailing. *Wagner* v. *Ellis,* 422.

10. SAME. *Objections must be seasonable and specific.*
Objections to testimony must be seasonably interposed and made sufficiently specific to present, and not to obscure, the question involved. *Ib.*

11. SAME. *Concrete case.*
A defendant who, without objection, permitted plaintiff to prove the contents of a writing by parol, cannot make the admission of such proof the predicate of an assignment of error in the supreme court, although in the course of the examination of a plaintiff's rebutting witness he made a general objection, which was overruled, to an inquiry touching the contents of the writing. *Ib.*

12. CONTRACTS. *Writing. Parol.*
The terms of a written contract cannot be varied or enlarged by parol. *Hightower* v. *Henry,* 476.

13. SAME. *Concrete case.*
A duly executed writing in these words, "On or before November 15th, next after date, I promise to pay to the order of Hightower & Cassity three hundred and sixty dollars, rent for ninety acres land at four dollars per acre, of Laban plantation, for the year 1901. Value received," is not only a promissory note, but a contract which cannot be varied by parol evidence showing an agreement on the part of the payees and landlords to put a fence around the leased premises. *Ib.*

14. EMINENT DOMAIN. *Levee damages.*
A judgment for damages for land taken and damaged for levee purposes will not be disturbed on the ground that it is excessive, when a judgment for a much larger sum might have been given under the evidence. *Levee Commrs.* v. *Yazoo, etc., R. Co.,* 508.

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EVIDENCE — *Continued.*

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The fact that one witness who testified favorably for the defendant was incompetent affords no ground for setting aside a judgment awarding defendant a certain sum as damages on condemnation of his land for levee purposes, when the judgment is fully sustained by competent evidence. *Levee Commrs.* v. *Yazoo, etc., R. Co.*, 508.

16. SAME. *Evidence. Use to which land is applied. Steamboat landing.*

Evidence of the value of the land in question as a steamboat landing is competent in a proceeding to condemn land for levee purposes. *Ib.*

17. CRIMINAL LAW. *Murder. Previous difficulty.*

Where on the trial of a murder case the state designedly proved a previous difficulty between deceased and the accused, it was error to deny defendant the right to show the details of such difficulty. *Brown* v. *State,* 511.

18. SAME. *Supreme court practice.*

In such case, upon appeal, the state cannot claim that the error is non-prejudicial because the record fails to show what the details of the previous difficulty were, where it does show that defendant was not permitted to state to the trial court, even out of the hearing of the jury, what he expected to prove touching the details. *Ib.*

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In homicide, after the defense has rested, it is error to admit testimony for the state which is not in rebuttal of that for the defendant, but direct, in the absence of a showing that it came to the state's knowledge after the conclusion of its evidence. *Flowers* v. *State,* 591.

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In homicide, it is error to permit a district attorney, who has been improperly allowed to introduce the direct testimony of a witness offered in rebuttal, to fortify the testimony of such witness by that of himself in relation to and explanatory of previous statements made by the witness; and such error is not cured by the subsequent exclusion of the district attorney's testimony. *Ib.*

21. SAME. *Right of defendant. Unfair restrictions.*

It is error in homicide, after improperly admitting in rebuttal direct testimony for the state as to dying declarations, to exclude testimony for the defense in conflict therewith. *Ib.*

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EVIDENCE — *Continued.*

22. CRIMINAL LAW. *Murder. Other crime. Identity of crime.*

Where, upon the trial of a murder case, the theory of the state being that defendant procured another to kill deceased, it appeared that the deceased had recently slain the brother of the accused, the trial court did not err in permitting the state to prove that the defendant had thereafter tried to hire a witness to kill deceased and, admitting his malice toward him, expressed his determination to have him killed. Such proof is not incompetent as being evidence of another crime, but is relevant and admissible. *Johnson* v. *State*, 572.

23. SAME. *Homicide. Boasting.*

Testimony is admissible in a murder case to show statements made by the accused, several hours after the killing, boasting of the deed. *Cook* v. *State*, 738.

24. SAME. *Co-defendant. Previous conviction of crime.*

It is not competent in a murder case to show that defendant's brother, who participated in the killing and had been indicted therefor, had been convicted of crime two years before in a municipal court then presided over by the deceased, where the evidence showed that the killing arose out of the occasion, without reference to any previous trouble. *Ib.*

EXECUTIONS.

1. VOID DESCRIPTION. *Vicinity.*

An execution sale is void for insufficient description of the land in the return, it not showing in what county or state it was, but merely describing it as certain sections and fractional sections "lying on or near the seashore in the vicinity of Miss." *Jones* v. *Rogers*, 802.

2. FEDERAL COURT. *Place of sale.*

Under Act Cong. May 19, 1828, ch. 68, secs. 3, 4 Stat., 281, providing that an execution on a judgment of a federal court and proceedings thereon shall be the same in each state as are now used in courts of such state; Act Cong. Feb. 16, 1839, ch. 27, secs. 4, 5 Stat., 317, providing that the marshal may, at the written request of defendant, change the sale of property in Mississippi to the place where the federal court for the district is held; and Act Miss., June 22, 1822, (How. & H. Dig., p. 633), sec. 17, providing that sales of land shall be at the courthouse of the county—an execution sale by a marshal, on a judgment of a federal court, outside the county in which the land was situated, was void, unless it was at the place of holding the federal court of the district, and the return showed that it was on the "written request" of defendant. *Ib.*

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EXECUTIONS — *Continued.*

3. FEDERAL COURT.

Neither the return on an execution that the execution sale by a marshal, on a judgment of a federal court, outside the county where the land was situated, was "in J.," nor the bill in a suit to remove clouds from title alleging that it was at the "front door of the statehouse in J.," shows that the sale was at the place authorized by Act Cong., Feb. 16, 1839, ch. 27, secs. 4, 5 Stat., 317, "the place where the United States court for the district is holden"—that is, the special house in which the federal court held its sittings. *Jones* v. *Rogers*, 802.

4. DEED. *Presumption.*

Under the mere allegations of a bill to remove clouds from title that the marshal made execution sale of the land to complainants' ancestor, and that the land records of the county were destroyed, it cannot be presumed that the marshal executed a deed to the purchaser, and that it was recorded. *Ib.*

5. BILL TO REMOVE CLOUDS. *Averments.*

The allegation of the bill to remove clouds from title that complainants' ancestor, under the execution sale to whom they claim, was at the time of his death seized and possessed in fee simple of the lands, is merely a legal conclusion, and a statement of constructive possession, not of actual possession. *Ib.*

6. SAME.

The allegation of the bill to remove clouds from title, complainants claiming under an execution sale, that defendant in execution "yielded up possession" of the lands "after" the sale, is insufficient to show to whom or when possession was yielded, or that the purchaser, or any one claiming under him, ever had actual possession. *Ib.*

7. RETURN. *Deed.*

A return on an execution does not transfer title, but only gives a right to demand a deed conveying title.

8. SAME.

In the absence of a showing that one's bid at execution sale was consummated by deed, it will be presumed after sixty years that he renounced it. *Ib.*

9. SAME.

A deed to the purchaser at execution sale will not be presumed in the absence of a showing that he went into possession under the sale and continued in possession. *Ib.*

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EXECUTORS.

See ESTATES OF DECEDENTS.

EXEMPTIONS.

HOMESTEAD. *Conveyance. Code* 1892, § 1983. *Non-joinder of wife. Warranty. Estoppel.*

The conveyance of a homestead, or any part of it, by the husband while living with his wife without her joining him in the deed, is not valid or binding, under Code 1892, § 1983, so providing, and a warranty clause does not create an estoppel against the maker of the deed, even after the death of his wife. *Bolen* v. *Lilly*, 344.

FELLOW-SERVANTS.

See MASTER AND SERVANT, 1, 2, 3, 4, 5.

FIELD NOTES.

See DEEDS, 6.

FORFEITURE.

See DEEDS, 5.

FORGERY.

1. IMMATERIAL ALTERATION. *Code* 1892, § 1106.

Under Code 1892, § 1106, defining forgery and confining the crime to instances where any person may be affected, bound, or in any way injured in his person or property, the mere alteration of the figures, following the character "$," in the upper right-hand corner of a draft, changing "$2.50" to "$12.50," does not constitute forgery where in the body of the instrument the sum ordered paid was distinctly written "two and 50-100 dollars," and this is especially true where the paper upon which the draft was written had distinctly stamped upon its face the words "Ten Dollars or Less," since the alteration was of an immaterial part of the instrument and could not injure any one. *Wilson* v. *State*, 687.

2. SAME. *Attempt. Code* 1892, § 974.

Nor do the facts above stated constitute an attempt to forge, under Code 1892, § 974, forbidding conviction of an attempt to commit a crime when it shall appear that the crime intended or the offense attempted was perpetrated, since the writing of the figure "1" between the "$" and the "2.50" was fully accomplished and no other effort or intent is shown or suggested. *Ib.*

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FRAUD AND FRAUDULENT CONVEYANCES.

1. FRAUDS. *Property used in business. Undisclosed principal. Business sign. Code* 1892, § 4234.

Where a claim is made to property which has been seized under execution against a firm, one member of which had taken out in his own name a privilege license to carry on the business in which the property was used, advertised sales of such property in the name of the firm, used shipping tags in its name, and made sales and rendered accounts in his own name, the claimant cannot prevail by proving a purchase of the property from the debtor firm and the employment of such member thereof as his agent, when it further appears that the member so carrying on the business has failed to disclose the name of his principal or the real owner by a sign in letters easy to be read placed conspicuously at the house where such business is carried on, since for want of such sign, under Code 1892, § 4234, the property employed in the business is liable for his debts. *Dale* v. *Harahan*, 49.

2. FRAUDULENT CONVEYANCE. *Withholding deed from record. Agreement. Fictitious credit.*

The withholding from record of a deed:

(*a*) Is not fraudulent as against the creditors of the grantor where it results from mere inattention, indifference, or agreement, without fraudulent purpose to give the grantor a fictitious credit; but

(*b*) For a bank to withhold a deed to it from record by agreement with its president, the grantor, in order to give him a fictitious credit, is a fraud in fact as against the president's creditors who became such without notice of the deed, and the bank's claim thereunder will be postponed to the rights of such creditors. *Johnston* v. *Bank*, 234.

3. HUSBAND AND WIFE. *Code* 1892, § 2294. *Transfers of property. Suits pending.*

A transfer of property from a husband to his wife otherwise valid, under Code 1892, § 2294, regulating the subject, is not rendered invalid by the fact that suits were threatened or pending against the husband at the time it was made. *Donoghue* v. *Shull*, 404.

4. SAME. *Fraudulent conveyances. Subsequent creditors. Code* 1892, § 4228.

Although a transfer of property from a husband to his wife was made with intent to defraud existing creditors of the husband, it is valid as to his subsequent creditors, under Code 1892, § 4228, so providing, unless made to defraud them; and hence it is valid as to a creditor who had knowledge of the transfer, consented thereto, and treated the wife as the real owner of the property so transferred before the husband contracted the debt due to him. *Ib.*

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FRAUD AND FRAUDULENT CONVEYANCES—*Continued.*

5. CONVEYANCE. *Duress. Laches.*

A decree canceling a conveyance for fraud and duress is not justified by evidence showing that two years after complainant acquired the half interest in the property constituting the subject of the conveyance and seventeen years before the filing of the bill, a mineral deposit of alleged medicinal value was discovered on the land, that during several years three different agencies attempted to exploit the sale of the mineral, but failed, and that it was not until long after complainant had conveyed his half interest to his partner, under a proposition to buy or sell at a given price, that the mineral was found to be valuable. *Horn* v. *Beatty,* 504.

FRAUDS, STATUTE OF.

1. SALES. *Cipher telegrams. Letters. Evidence. Code* 1892, § 4229.

Where a contract for the sale of personal property is evidenced by letters between the parties, fully recognizing the existence and setting forth the terms of the contract, it is immaterial that precedent cipher telegrams do not sufficiently show a sale to take the case out of the statute of frauds. *Bonds* v. *Lipton Co.,* 209.

2. SALE OF LANDS. *Contract for commissions. Code* 1892, § 4225, *par.* (*c*).

The statute of frauds in reference to oral agreements for the sale of interests in land, Code 1892, § 4225, par. (c), does not affect an agent's right to compensation for selling land pursuant to oral instructions. *Hancock* v. *Dodge,* 228.

3. VENDOR AND PURCHASER. *Specific performance. Contract. Code* 1892, § 4225, *par.* (*c*). *Offer. Acceptance.*

Where an offer to purchase land presents two alternative propositions, a mere acceptance of the offer, without specifying which proposition is accepted, does not create a contract which can be specifically enforced. *Welch* v. *Williams,* 301.

GRAND JURY.

1. CRIMINAL LAW. *Charge to grand jury. Code* 1892, § 2373. *Unlawful sale of intoxicants. Indictment. Quashal.*

Although the statute, Code 1892, § 2373, requires the circuit judge to charge the grand jury touching its duty, and requires him especially to give in charge the statute against the unlawful sale of intoxicants, it is improper for the judge, directly or indirectly, to designate a particular individual as making such sales. If he does so, and the individual be indicted for the crime, the indictment, on seasonable motion, will be quashed. *Fuller* v. *State,* 199.

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GRAND JURY — *Continued.*

2. SAME. *Judicial indiscretion.*

A conviction for the unlawful sale of intoxicants will be reversed if, on overruling defendant's application for a continuance, the trial judge, in the presence of jurors, announce that there has been much complaint about the failure to convict "these criminals," and that the court feared it was largely due to continuances. *Fuller* v. *State*, 199.

HABEAS CORPUS.

AFFIDAVIT. *No offense charged. Discharge of relator. Code* 1892, § 2228.

A relator who has been arrested upon an affidavit, purporting to be predicated of said statute (Laws 1900, p. 140), which charges no offense, should be discharged upon *habeas corpus*, notwithstanding Code 1892, § 2228, providing that a person shall not be discharged on *habeas corpus* because of invalid proceedings if he ought to be held for any crime alleged against him, where it is not made manifest that he has been guilty of some crime. *Ex parte George Harris*, 4.

HOMESTEAD.

See EXEMPTIONS.

HOMICIDE.

1. CRIMINAL LAW. *Murder. Principal and accessories.*

One who aids, assists, and encourages a murder is a principal, and not an accessory; and his guilt in no wise deoends upon the guilt or innocence, the conviction or acquittal, of any other alleged participant in the crime. *Dean* v. *State*, 40.

2. SAME. *Instruction. Designating killing as murder.*

If it be unquestionable that a murder was committed, and the only inquiry be as to the identity of the criminal, reversible error cannot be predicated of an instruction because it refers to the crime as murder. *Ib.*

3. SAME. *Evidence.*

In a trial for murder, committed as a result of a conspiracy to rob the deceased, the admission of testimony tending to show that money was in the decedent's house before the murder and not there afterwards, and that decedent's wife was murdered and the house burned during the same night the deceased was killed, is not reversible error. *Ib.*

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HOMICIDE — *Continued.*

4. CRIMINAL LAW. *Murder. Jurors. Voir dire examination. Reasonable doubt.*

A man's conception of a reasonable doubt is not a proper subject of inquiry when he is presented as a juror in a criminal case and examined on his *voir dire. Fugate* v. *State,* 86.

5. SAME. *Estimate of witness.*

Whether a proffered juror would believe a certain witness for the state on oath is not a proper subject of inquiry upon his *voir dire* examination in a criminal case. *Ib.*

6. SAME. *Evidence. Witnesses differing.*

Where testimony touching a certain conversation with the accused, unquestionably relating to the deceased, is otherwise competent, it is not rendered inadmissible in evidence because the witnesses fail to corroborate each other in some particulars concerning it. *Ib.*

7. SAME. *Theories. Duty of jury.*

The rule that where there are two reasonable theories as to the facts of a killing, one favorable and the other unfavorable to the accused, the jury are bound to accept the favorable one, only applies in case the jury be in doubt as to the correctness of the unfavorable one. *Ib.*

8. SAME. *Instructions. Modifications. Harmless error.*

Where the court instructed the jury in a murder case to the effect that the accused was presumed to be innocent, and that the presumption was an instrument of proof whereby his innocence was established until sufficient evidence should be introduced to overcome it, the erroneous modification of another part of the instruction, charging that the presumption of innocence is not merely a presumption of law, but is evidence in behalf of the accused, by striking out the word "evidence" and inserting "presumption," does not constitute reversible error. *Ib.*

9. SAME. *Murder. Conspiracy. Instruction.*

The principle that where parties combine to commit crime the law imputes the guilt of each to all thus engaged and holds all to be guilty of any crime committed by either in the execution of the common purpose is founded upon the idea that a common intent to do some unlawful act existed in the minds of the parties prior to the commission of the crime which results from the combination; hence an instruction which seeks to apply the principle in the absence of evidence of such common intent to do an unlawful act is erroneous. *Sullivan* v. *State,* 149.

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HOMICIDE — *Continued.*

10. CRIMINAL LAW. *Self-defense.*

Where in a murder case the defense is not predicated of self-defense it is erroneous to give an instruction to the effect that self-defense can only be availed of under certain circumstances of which there was no evidence. *Sullivan* v. *State*, 149.

11. SAME.

On prosecution for murder in a difficulty between deceased and defendant and his son, an instruction authorizing conviction if the son killed deceased, not in necessary self-defense, if defendant aided in such killing, though deceased provoked the difficulty with defendant or the son, provided deceased was fighting with his hands only, was erroneous. *Ib.*

12. SAME. *Murder. Evidence. Error in admitting. Exclusion. Curative effect.*

The vital question in a prosecution for murder being whether defendant or deceased was the aggressor, and the evidence on the subject sharply conflicting, the error of admitting hearsay evidence to the effect that defendant had threatened deceased was not cured by its subsequent exclusion, with direction to the jury to disregard it. *Davis* v. *State*, 416.

13. SAME. *Witnesses. Impeachment. Collateral matters. Relevancy.*

The defendant in a murder case and his wife having testified that she did not, after the killing, say to him in the presence of third persons, "If you had listened to me, you would not have gone down there and the man would not have been killed," it was error to allow the state to contradict them, since their testimony on the subject related to a collateral and irrelevant matter. *Ib.*

14. SAME. *Murder. Previous difficulty. Evidence.*

Where on the trial of a murder case the state designedly proved a previous difficulty between deceased and the accused, it was error to deny defendant the right to show the details of such difficulty. *Brown* v. *State*, 511.

15. SAME. *Supreme court practice.*

In such case, upon appeal, the state cannot claim that the error is non-prejudicial because the record fails to show what the details of the previous difficulty were, where it does show that defendant was not permitted to state to the trial court, even out of the hearing of the jury, what he expected to prove touching the details. *Ib.*

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HOMICIDE — *Continued.*

16. CRIMINAL LAW. *Murder. Evidence. Other crime. Identity of crime.*

Where, upon the trial of a murder case, the theory of the state being that defendant procured another to kill deceased, it appeared that the deceased had recently slain the brother of the accused, the trial court did not err in permitting the state to prove that the defendant had thereafter tried to hire a witness to kill deceased and, admitting his malice toward him, expressed his determination to have him killed. Such proof is not incompetent as being evidence of another crime, but is relevant and admissible. *Johnson* v. *State*, 572.

17. SAME. *Instruction.*

In such case an instruction, authorizing the conviction of defendant "if he counseled, procured, or commanded the killing of deceased," does not constitute reversible error, where it was shown by the record of the conviction of the person who did the killing that he pleaded guilty to the charge of murder and there was no doubt or dispute as to the decedent having been murdered. *Ib.*

18. SAME. *Case.*

Facts examined and adjudged sufficient to support a conviction of murder. *Ib.*

19. SAME. *Evidence. Direct evidence in rebuttal.*

In homicide, after the defense has rested, it is error to admit testimony for the state which is not in rebuttal of that for the defendant, but direct, in the absence of a showing that it came to the state's knowledge after the conclusion of its evidence. *Flowers* v. *State*, 591.

20. SAME. *District attorney as witness. Practice.*

In homicide it is error to permit a district attorney, who has been improperly allowed to introduce the direct testimony of a witness offered in rebuttal, to fortify the testimony of such witness by that of himself in relation to and explanatory of previous statements made by the witness; and such error is not cured by the subsequent exclusion of the district attorney's testimony. *Ib.*

21. SAME. *Right of defendant. Unfair restrictions.*

It is error in homicide, after improperly admitting in rebuttal direct testimony for the state as to dying declarations, to exclude testimony for the defense in conflict therewith. *Ib.*

22. SAME. *Homicide. Evidence. Boasting.*

Testimony is admissible in a murder case to show statements made by the accused, several hours after the killing, boasting of the deed. *Cook* v. *State*, 738.

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HOMICIDE — *Continued.*

23. CRIMINAL LAW. *Co-defendant. Previous conviction of crime.*

It is not competent in a murder case to show that defendant's brother, who participated in the killing and had been indicted therefor, had been convicted of crime two years before in a municipal court then presided over by the deceased, where the evidnce showed that the killing arose out of the occasion, without reference to any previous trouble. *Cook* v. *State*, 738.

24. SAME. *Witnesses. Code* 1892, § 1746.

Under Code 1892, § 1746, authorizing the interrogation of witnesses as to whether they have been convicted of crime, in order to determine their credibility, testimony of a conviction cannot be given by others until the witness has first denied the same. *Ib.*

25. SAME. *Instruction. Assumption of fact.*

Where at the time deceased picked up a weapon the defendant was being securely held by two men and therefore unable to make an attack, an instruction which assumes that the deceased picked up the weapon to defend himself from an assault by defendant is erroneous. *Ib.*

26. SAME. *Murder or manslaughter. Question for jury.*

Whether a defendant was guilty of murder or of manslaughter should be left to the determination of the jury, although the evidence shows an unpremeditated killing by defendant's brother in response to the request of defendant who had just been engaged in a fight, and was held by two men, confronted by deceased armed with a stick to attack some one, when he made the request. *Ib.*

27. SAME. *Presumptions of innocence.*

All persons are presumed to be absolutely innocent of a crime charged against them, in its entirety, and in all its material parts, until the jury finds to the contrary on proper instructions, based on competent and relevant testimony. *Ib.*

See JURIES, 6.

HUSBAND AND WIFE.

1. MARRIAGE AND DIVORCE. *Alimony pendente lite. Invalidity of marriage.*

A complainant in a suit for divorce who is the undivorced wife of another is not entitled to recover of the defendant alimony *pendente lite,* and the defendant may show in defense of an application for the same the truth of his answer under oath denying the validity of his marriage to complainant because of her relation as wife to another person. *Reed* v. *Reed,* 126.

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HUSBAND AND WIFE — *Continued.*

2. HOMESTEAD. *Conveyance. Code* 1892, § 1983. *Non-joinder of wife. Warranty. Estoppel.*

The conveyance of a homestead, or any part of it, by the husband while living with his wife without her joining him in the deed, is not valid or binding, under Code 1892, § 1983, so providing, and a warranty clause does not create an estoppel against the maker of the deed, even after the death of his wife. *Bolen* v. *Lilly,* 344.

3. SAME. *Code* 1892, § 2294. *Transfers of property. Suits pending.*

A transfer of property from a husband to his wife otherwise valid, under Code 1892, § 2294, regulating the subject, is not rendered invalid by the fact that suits were threatened or pending against the husband at the time it was made. *Donoghue* v. *Shull,* 404.

4. SAME. *Fraudulent conveyances. Subsequent creditors. Code* 1892, § 4228.

Although a transfer of property from a husband to his wife was made with intent to defraud existing creditors of the husband, it is valid as to his subsequent creditors, under Code 1892, § 4228, so providing, unless made to defraud them; and hence it is valid as to a creditor who had knowledge of the transfer, consented thereto, and treated the wife as the real owner of the property so transferred before the husband contracted the debt due to him. *Ib.*

5. SAME. *Conveyances. Code* 1892, § 2294. *Creditors.*

A conveyance executed for value and in good faith by a husband to his wife cannot be avoided by a creditor of the husband whose debt was unsecured at the time, under Code 1892, § 2294, providing that a conveyance between husband and wife shall not be valid as against a third person unless it be filed for record, where it was filed for record before the creditor obtained a lien. *Green* v. *Weems,* 566.

INDICTMENT.

1. CRIMINAL LAW. *Charge to grand jury. Code* 1892, § 2373. *Unlawful sale of intoxicants. Indictment. Quashal.*

Although the statute, Code 1892, § 2373, requires the circuit judge to charge the grand jury touching its duty, and requires him especially to give in charge the statute against the unlawful sale of intoxicants, it is improper for the judge, directly or indirectly, to designate a particular individual as making such sales. If he does so, and the individual be indicted for the crime, the indictment, on seasonable motion, will be quashed. *Fuller* v. *State,* 199.

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INDICTMENT — *Continued.*

2. CRIMINAL LAW. *Judicial indiscretion.*

A conviction for the unlawful sale of intoxicants will be reversed if, on overruling defendant's application for a continuance, the trial judge, in the presence of jurors, announce that there has been much complaint about the failure to convict "these criminals," and that the court feared it was largely due to continuances. *Fuller* v. *State*, 199.

3. ASSAULT WITH INTENT TO KILL. *Assault and battery with intent to kill. Code* 1892, § 967. *Instruction. Counts in indictment.*

Where a defendant was charged, under Code 1892, § 967, in one count with an assault with intent to kill and murder, and in another count of the same indictment with an assault and battery with like intent, and there was no evidence of the battery, it was error to instruct the jury, generally, that the want of such evidence was immaterial, drawing no distinction between the counts of the indictment. *Montgomery* v. *State*, 330.

INJUNCTION.

1. CHANCERY PRACTICE. *Waste. Co-tenants.*

One tenant in common is entitled to an injunction against his co-tenants to restrain unusual and unreasonable waste, indicating malice and tending to destroy the chief value of the land. *Leatherbury* v. *McInnis*, 160.

2. SAME. *Limitation of injunction.*

Where one tenant in common has enjoined his co-tenant from destroying timber which covers the entire tract and constitutes its chief value, and there is no showing that the timber on one part of the tract is of more value than that on any other part, the injunction should be limited so as to restrain the defendant only from destroying more trees than such proportionate part thereof as corresponds with his interest in the land. *Ib.*

3. NEW TRIAL. *Equity. Judgment fraudulent in effect.*

Where the plaintiff's attorney caused defendant's attorney to believe and act upon the idea that a case would not be tried at the next term of the justice's court, but would be continued, a judgment taken by the plaintiff himself, in the absence of the defendant and his attorney at said term, is fraudulent in its effect, and after the defendant, being without fault, has lost the right of appeal, will be enjoined and a new trial will be granted in equity, although the plaintiff's attorney acted without intent to deceive. *Gulf, etc., R. Co.* v. *Flowers*, 633.

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INSTRUCTIONS.

1. DESIGNATING KILLING AS MURDER.

If it be unquestionable that a murder was committed, and the only inquiry be as to the identity of the criminal, reversible error cannot be predicated of an instruction because it refers to the crime as murder. *Dean* v. *State,* 40.

2. MODIFICATIONS. *Harmless error.*

Where the court instructed the jury in a murder case to the effect that the accused was presumed to be innocent, and that the presumption was an instrument of proof whereby his innocence was established until sufficient evidence should be introduced to overcome it, the erroneous modification of another part of the instruction, charging that the presumption of innocence is not merely a presumption of law, but is evidence in behalf of the accused, by striking out the word "evidence" and inserting "presumption," does not constitute reversible error. *Fugate* v. *State,* 86.

3. PRACTICE. *Peremptory instruction.*

A peremptory instruction should not be given for the defendant if the state of the evidence be such that the court would not vacate a verdict predicated thereof in plaintiff's favor. *Rhymes* v. *Jackson, etc., Co.,* 140.

4. CRIMINAL LAW. *Murder. Conspiracy.*

The principle that where parties combine to commit crime the law imputes the guilt of each to all thus engaged and holds all to be guilty of any crime committed by either in the execution of the common purpose is founded upon the idea that a common intent to do some unlawful act existed in the minds of the parties prior to the commission of the crime which results from the combination; hence an instruction which seeks to apply the principle in the absence of evidence of such common intent to do an unlawful act is erroneous. *Sullivan* v. *State,* 149.

5. SAME. *Self-defense.*

Where in a murder case the defense is not predicated of self-defense it is erroneous to give an instruction to the effect that self-defense can only be availed of under certain circumstances of which there was no evidence. *Ib.*

6. SAME.

On prosecution for murder in a difficulty between deceased and defendant and his son, an instruction authorizing conviction if the son killed deceased, not in necessary self-defense, if defendant aided in such killing, though deceased provoked the difficulty with defendant or the son, provided deceased was fighting with his hands only, was erroneous. *Ib.*

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INSTRUCTIONS — *Continued.*

7. SUPREME COURT PRACTICE. *Striking from record. Filing. Identifying. Code* 1892, § 732.

Where a number of instructions, each having been acted upon by the judge, were attached together and filed by the clerk on the back of a common wrapper, they will not, nor will any one of them, be stricken from the record by the supreme court because each particular piece of paper containing an instruction was not separately marked and filed, on the claim that Code 1892, § 732, regulating the filing of instructions so as to make them a part of the record, had not been complied with. *Gulf, etc., R. Co.* v. *Boswell*, 313.

8. SAME. *Appellant estopped by own instructions.*

Where an appellant asked for and was given an instruction propounding a legal proposition as applicable to the case, he cannot complain of an instruction for the appellee because it propounds the same proposition. *Ib.*

9. RAILROADS. *Licensees. Punitive damages.*

Where, in an action against a railroad for injuries to a licensee in a freight car, an instruction on punitive damages was granted plaintiff which was correctly phrased, the supreme court cannot determine, in the absence of a record containing the facts, whether or not defendant was prejudiced thereby. *Ib.*

10. SAME.

Where, in an action for injuries to a licensee in a railroad car, the statement in the declaration of the injuries inflicted, if true, would warrant a recovery of compensatory damages in an amount exceeding the verdict, an objection, on appeal, that punitive damages were improperly awarded will not be considered in the absence of all evidence. *Ib.*

11. ASSAULT WITH INTENT TO KILL. *Assault and battery with intent to kill. Code* 1892, § 967. *Counts in indictment.*

Where a defendant was charged, under Code 1892, § 967, in one count with an assault with intent to kill and murder, and in another count of the same indictment with an assault and battery with like intent, and there was no evidence of the battery, it was error to instruct the jury, generally, that the want of such evidence was immaterial, drawing no distinction between the counts of the indictment. *Montgomery* v. *State*, 330.

12. SAME. *Practice. Time of granting instructions.*

The proper time for granting instructions is after the close of the evidence and before the argument of the case. While the court

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INSTRUCTIONS — *Continued.*

has the right to grant an instruction at any time before the jury retires, it should not be done after argument is commenced, except on rare and emergent occasions and with opportunity to the other party to prepare and request counter charges. *Montgomery* v. *State*, 330.

13. ASSAULT WITH INTENT TO KILL.

The procuring of an instruction in a criminal case from the court during the argument for defendant, whose counsel had no notice thereof until it was produced for the first time during the closing argument for the state, was error, though on objection the state's attorney offered to permit defendant's counsel then to answer it. *Ib.*

14. WITNESSES. *Rejection of false testimony. Right of jurors.*

An instruction is erroneous which advises the jury that they may reject the entire testimony of a witness who has sworn falsely in any particular, without embodying the limitation that such false swearing must have been done willfully, knowingly, and corruptly. *Sardis, etc., R. Co.* v. *McCoy*, 391.

15. DAMAGES. *Erroneous instruction.*

Error in an instruction informing the jury of their right to award exemplary damages will not compel a reversal of a judgment in plaintiff's favor for a sum not exceeding fair compensation for the injury suffered. *Bradford* v. *Taylor*, 409.

16. ASSUMPTION OF FACT.

Where at the time deceased picked up a weapon the defendant was being securely held by two men, and therefore unable to make an attack, an instruction which assumes that the deceased picked up the weapon to defend himself from an assault by defendant is erroneous. *Cook* v. *State*, 738.

INSURANCE.

ACCIDENT INSURANCE. *Construction of policy. Internal injuries. Pleadings.*

Where an accident from external means results in internal injuries the case is within the terms of an accident policy insuring "against loss effected solely, directly, and independently of all other causes, by bodily injuries sustained through external, violent, and accidental means," and it is unnecessary in a suit upon the policy to specify in the declaration the particular organ hurt. *Pervangher* v. *Union, etc., Co.*, 31.

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INTEREST AND USURY.

EQUITY. *Jurisdiction. Fraudulent conduct. Illegal contracts.*

A lender of money at extortionate rates of interest, under contracts which are void as against public policy, who establishes an agency for the carrying on of his nefarious business, cannot maintain a suit in equity against one who was placed by him in charge of such business for an accounting where he must call in the aid, directly or indirectly, of the illegal contracts to make out his case. *Woodson* v. *Hopkins,* 171.

INTERPLEADER.

1. INTERPLEADER. *Chancery practice. Injunction.*

Though relief by injunction be asked therein, a bill by debtors to ascertain to whom their debt should be paid is a bill of interpleader, and the rights of parties should be treated accordingly. *Quin* v. *Hart,* 71.

2. SAME. *Payment into court.*

A complainant in a bill of interpleader is not entitled to relief by injunction when he has paid nothing into court. *Ib.*

INTOXICATING LIQUORS.

UNLAWFUL SALE. *Evidence. Tricks.*

The sale of a ticket, representing intoxicating liquor, so arranged that as each bottle of liquor might be delivered a hole could be punched in the ticket to show the fact and the subsequent delivery of one or more bottles of liquor to the holder of the ticket, upon its presentation and punching, is a sale of liquor so delivered, although the money was paid by the purchaser when he received the ticket. *Harper* v. *State,* 338.

JOINT DEFENDANTS.

MASTER AND SERVANT. *Verdict against master.*

Where a master and his servant were jointly sued in trespass for the acts of the servant, a verdict rightfully convicting the master, but wrongfully acquitting the servant, should not be set aside on motion of the master because of the acquittal of the servant. *Illinois, etc., R. Co.* v. *Clarke,* 691.

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JUDGMENTS.

1. STATUTES OF LIMITATIONS. *Code* 1892, § 2743. *New suit by assignee.*

A suit by the assignee of a judgment, within the period of limitation, is a full compliance with the statute and extends the lien of the judgment, under Code 1892, § 2743, providing that actions on judgments shall be brought within seven years after their rendition. *Street* v. *Smith,* 359.

2. SAME. *Judgment roll. Notice. How lien extended.*

Under Code 1892, § 2743, requiring actions on judgments to be brought within seven years after the rendition thereof:

(*a*) The judgment roll, in case of a recovery in an action by an assignee of the judgment to renew the same, need not show the assignment or that the new judgment was based on the original assigned one; and

(*b*) The lien of a judgment can be extended only by the bringing of a suit thereon within the statutory period. *Ib.*

3. SAME. *Lien. Apparent bar. Renewal and extension. Code* 1892, § 2462.

Code 1892, § 2462, providing that, where the remedy to enforce any lien which is recorded appears by the record to have been barred by limitations, the lien shall cease, as to creditors and *bona fide* purchasers, unless within six months after such remedy is so barred the fact that such lien has been renewed or extended appears by entry on the record, or by a new instrument filed for record within such time, has no application to judgment liens. *Ib.*

4. JUSTICE OF THE PEACE. *Process. Service. Time.*

The judgment of a justice of the peace rendered in a civil case against a defendant, not a non-resident or transient person, upon less than five days' service of process, is utterly void. (For the exception of non-residents and transient persons, see Code 1892, § 2399.) *Comenitz* v. *Bank,* 662.

5. SAME. *Judgment against two or more. Entirety. Void as to one, void as to all.*

The judgment of a justice of the peace, rendered in a civil case against two or more defendants, is an entirety, and being void as to one, is void as to all of them. *Ib.*

6. RES ADJUDICATA. *Sale of chattel. Warranty. Suit for price.*

Where the seller sued for the price of a chattel, and the buyer pleaded a breach of warranty in defense, a judgment in plaintiff's favor will bar any subsequent action by the buyer or for a breach of the warranty. *Miller* v. *Bulkley,* 706.

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JUDGMENTS — *Continued.*

7. BOARD OF SUPERVISORS. *Judgment of. Collateral attack. Constitution* 1890, *sec.* 259.

An order of the board of supervisors declaring the proposition for a removal of the county seat carried, from which no appeal was taken, may be collaterally attacked in a suit to restrain execution of the order, where the record of the board shows that its action was in excess of its jurisdiction because the proposition was not carried by a two-thirds vote of all the qualified electors in the county, as required by Constitution 1890, sec. 259, when the place to which the county seat is to be removed is a greater distance from the geographical center of the county than the place where it was already located. *Simpson County* v. *Buckley*, 713.

JURISDICTION.

1. CHANCERY COURTS. *Fraudulent conveyances. Code* 1892, § 503. *Lis pendens. Code* 1892, §§ 2782-2789.

The provision of Code 1892, § 503, enlarging the chancery court jurisdiction of bills by creditors to vacate fraudulent conveyances, that the creditor shall have a lien on the property from the filing of his bill, except as against *bona fide* purchasers before the service of process on the defendant, is not affected by Code 1892, §§ 2782-2789, the chapter on *lis pendens*, the two statutes referring to different classes of litigants. *Fernwood, etc., Co.* v. *Meehan-Rounds, etc., Co.*, 54.

2. SAME. *Practice. Process. Non-resident defendants. Code* 1892, § 3421. *When service complete.*

A non-resident defendant in chancery, under Code 1892, § 3421, regulating process by publication and mailing for such defendants, is not served with process so as to authorize proceedings against him as if personally served until the completion of the required publication, and, in case his post office be known, the proper mailing of a summons to him. *Ib.*

3. SAME. *Concrete case.*

Where, in a suit under Code 1892, § 503, to set aside a conveyance as fraudulent, a *lis pendens* notice was filed, under Code 1892, §§ 2782, 2789, but the grantee in the deed, a non-resident defendant, without actual notice of the suit, conveyed the property to a *bona fide* purchaser before the completion of the publication and mailing of process against him, under Code 1892, § 3421, the purchaser will be protected in his title. *Ib.*

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JURISDICTION — *Continued.*

4. EQUITY. *Fraudulent conduct. Illegal contracts.*

A lender of money at extortionate rates of interest, under contracts which are void as against public policy, who establishes an agency for the carrying on of his nefarious business, cannot maintain a suit in equity against one who was placed by him in charge of such business for an accounting where he must call in the aid, directly or indirectly, of the illegal contracts to make out his case. ***Woodson*** v. ***Hopkins,*** 171.

5. EMINENT DOMAIN. *Special court. Justice of the peace. Code* 1892, § 1680. *Mandamus.*

In presiding over a special court of eminent domain, created by Code 1892, § 1680, the justice of the peace acts ministerially rather than judicially, and he may be controlled by mandamus. ***Sullivan*** v. *Yazoo, etc., R. Co.*, 649.

6. SAME. *Jurisdiction of circuit court. Meeting of eminent domain court. Time and place.*

The circuit court is, however, without power to fix the time and place for the meeting of the eminent domain court, and in awarding mandamus it should simply command the justice of the peace to reconvene the special court and proceed according to law. *Ib.*

JURY.

1. JURORS. *Competency. Code* 1892, § 2355. *Exclusion. Review.*

An appellant cannot predicate error of the action of the trial court in excluding a proffered juror from the panel of its own motion, under Code 1892, § 2355, providing that any juror shall be excluded if the court be of opinion that he cannot try the case impartially, and the exclusion shall not be assignable as error; nor can error be predicated of the action of the trial court in sustaining a challenge on the ground that there is a criminal case pending against the challenged juror. (See last sentence, Code 1892, § 2354, amended Laws 1894, p. 60.) *Lewis* v. *State,* 35.

2. TRIALS. *Retirement of jury.*

It is not error for the jury to be retired pending argument to the court on the competency of a witness. *Ib.*

3. CRIMINAL LAW. *Murder. Voir dire examination. Reasonable doubt.*

A man's conception of a reasonable doubt is not a proper subject of inquiry when he is presented as a juror in a criminal case and examined on his *voir dire.* ***Fugate*** v. ***State,*** 86.

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JURY — *Continued.*

4. CRIMINAL LAW. *Estimate of witness.*

Whether a proffered juror would believe a certain witness for the state on oath is not a proper subject of inquiry upon his *voir dire* examination in a criminal case. *Fugate* v. *State*, 86.

5. SAME. *Theories. Duty of jury.*

The rule that where there are two reasonable theories as to the facts of a killing, one favorable and the other unfavorable to the accused, the jury are bound to accept the favorable one, only applies in case the jury be in doubt as to the correctness of the unfavorable one. *Ib.*

6. CRIMINAL LAW. *Code* 1892, § 2355. *Impartiality. Insanity.*

Under Code 1892, § 2355, providing that a juror shall not be disqualified because he has an opinion as to the guilt or innocence of the accused, if it shall appear to the satisfaction of the court that he has no bias of feeling or prejudice in the case and no desire to reach any result in it except that to which the evidence may conduct, a conviction will not be reversed:

(*a*) Because a juror was adjudged competent who testified on his *voir dire* that he had read of the case; had heard rumors, but had never heard any of the witnesses; that he had an opinion from what he had heard which would require evidence to remove; that, though he had such opinion, he could give defendant a fair trial, because the opinion was based on what he had heard and read, and he had heard none of the particulars; that he had no bias or prejudice against defendant and would try him fairly and impartially on the evidence to be introduced; that he had no prejudice against the plea of insanity, and if the evidence caused him to have a doubt he thought he could give defendant its benefit; nor

(*b*) Because another juror was adjudged competent who testified on his *voir dire* that he had no bias or prejudice against defendant, and would give him a fair and impartial trial on the evidence; that he had heard nothing from any one who personally knew, but had formed and expressed an opinion from what he had seen in the newspapers; that this opinion would require testimony to remove, but testimony would remove it; that he would go into the jury box "as free as I believe it is possible for a human mind to be;" that he could not say but that he had a prejudice against the defense of insanity, but that he would give defendant the benefit of all reasonable doubt; that it would depend upon the nature of the insanity as to what effect it would have on his decision, but he would give defendant the benefit of it if it arose from disease which

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JURY — *Continued.*

he had contracted from cigarette smoking or from heredity; that in his judgment a man was not entitled to the plea of momentary insanity if his condition at the time of the homicide arose from drunkenness or from brooding over his relations with deceased; that he could give defendant the benefit of all reasonable doubt as to his guilt, whether that doubt was raised by the question of insanity or not. *Gammons* v. *State,* 103.

7. CRIMINAL LAW. *Challenges. Code* 1892, § 1423.

Under Code 1892, § 1423, providing that the accused shall have presented to him a full panel before being called upon to make his peremptory challenges, a defendant should withhold all peremptory challenges until a full panel is presented, and not interpose such a challenge on the overruling of his challenge for cause while the panel is incomplete. If a defendant challenges a juror peremptorily, being advised by the court that he need not do so while the panel is incomplete, he cannot complain that a full panel was not presented to him before he was called upon to make such challenges. *Ib.*

8. WITNESSES. *Rejection of false testimony. Instruction. Right of jurors.*

An instruction is erroneous which advises the jury that they may reject the entire testimony of a witness who has sworn falsely in any particular, without embodying the limitation that such false swearing must have been done willfully, knowingly, and corruptly. *Sardis, etc., R. Co.* v. *McCoy,* 391.

JUSTICES OF THE PEACE.

1. APPEALS. *Bond. Code* 1892, § 82.

Parties against whom judgments have been rendered by justices of the peace are not to be deprived of an appeal to the circuit court, under Code 1892, § 82, regulating the subject, by the ignorance or arbitrary action of the justice of the peace in demanding an appeal bond in a greater penalty than that authorized by the statute. *Redus* v. *Gamble,* 165.

2. SAME. *Code* 1892, § 84. *Failure to send up record. Power of the circuit court.*

If a justice of the peace, from whose judgment an appeal has been taken, fail to send the record to the circuit court as required by Code 1892, § 84, prescribing his duties in such cases, the circuit court may issue the necessary writ to enforce performance of duty by the recusant justice of the peace. *Ib.*

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JUSTICES OF THE PEACE — *Continued.*

3. APPEALS. *Code* 1892, § 89. *Certiorari.*

Such a writ, although commonly called a *certiorari,* is not a *certiorari* within the meaning of Code 1892, § 89, providing that all cases decided by a justice of the peace may be removed to the circuit court by writ of *certiorari* upon the terms therein specified. ***Redus* v. *Gamble*,** 165.

4. SAME. *Bond not required. Trial de novo.*

Such a writ may be issued to enforce performance of duty by the recusant justice of the peace without the appellant giving any other than the appeal bond, and when performance of duty by the justice is enforced the trial will be *de novo. Ib.*

5. APPEAL. *Record. Death of justice. Successor. Code* 1892, §§ 84, 2432.

Where a justice of the peace died after an appeal had been taken from his judgment, but before the record had been sent to the circuit court, and his administrator has complied with Code 1892, § 2432, providing that on the death of a justice of the peace his representative shall deliver his docket and papers to the clerk of the circuit court, who shall deliver them to the successor in office of the decedent, the appeal will not be dismissed, although a term of the court has intervened between the death of the justice and the return of the record to the circuit court, and Code 1892, § 84, requires a justice of the peace in case of appeal to transmit the record to the circuit court on or before the next term thereof after the taking of the appeal. ***Brennan* v. *Straas*,** 341.

6. NEW TRIAL. *Equity. Judgment fraudulent in effect. Injunction.*

Where the plaintiff's attorney caused defendant's attorney to believe and act upon the idea that a case would not be tried at the next term of the justice's court, but would be continued, a judgment taken by the plaintiff himself, in the absence of the defendant and his attorney at said term, is fraudulent in its effect, and after the defendant, being without fault, has lost the right of appeal, will be enjoined and a new trial will be granted in equity, although the plaintiff's attorney acted without intent to deceive. *Gulf, etc., R. Co.* v. *Flowers,* 633.

7. EMINENT DOMAIN. *Special court. Mandamus.*

In presiding over a special court of eminent domain, created by Code 1892, § 1680, a justice of the peace acts ministerially rather than judicially, and he may be controlled by mandamus. ***Sullivan* v. *Yazoo, etc., R. Co.*,** 649.

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JUSTICES OF THE PEACE — *Continued.*

8. JUDGMENT. *Process. Service. Time.*

The judgment of a justice of the peace rendered in a civil case against a defendant, not a non-resident or transient person, upon less than five days' service of process, is utterly void. (For the exception of non-residents and transient persons, see Code 1892, § 2399.) *Comenitz* v. *Bank*, 662.

9. SAME. *Judgment against two or more. Entirety. Void as to one, void as to all.*

The judgment of a justice of the peace, rendered in a civil case against two or more defendants, is an entirety, and being void as to one, is void as to all of them. *Ib.*

LACHES.

1. *Cancellation of deeds. Duress.*

A complainant in a bill to cancel a conveyance for alleged fraud and duress who delays bringing the proceeding for nearly seven years after the date of the instrument, and who receives in the meantime four annual payments of the purchase money, is barred by laches. *Horn* v. *Beatty*, 504.

2. SAME. *Case.*

A decree canceling a conveyance for fraud and duress is not justified by evidence showing that two years after complainant acquired the half interest in the property constituting the subject of the conveyance and seventeen years before the filing of the bill, a mineral deposit of alleged medicinal value was discovered on the land, that during several years three different agencies attempted to exploit the sale of the mineral, but failed, and that it was not until long after complainant had conveyed his half interest to his partner, under a proposition to buy or sell at a given price, that the mineral was found to be valuable. *Ib.*

LANDLORD AND TENANT.

LABORER. *Share-cropper. Violation of contract. Laws 1900, p. 140, ch. 101. Criminal law.*

Laws 1900, p. 140, ch. 101, making it a misdemeanor for any laborer, renter, or share-cropper, who has contracted with another person in writing for a specified time, not exceeding one year, to leave his employer or the leased premises before the expiration of his contract, without the consent of his employer or landlord, and make

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LANDLORD AND TENANT — *Continued.*

a second contract without giving notice of the first one to the second party, is not violated by a person, under such first contract, who merely obtained money from his employer or landlord on pretense of going to certain places on business, and who left the premises of his employer or landlord and did not return. *Ex parte George Harris,* 4.

LAWS (OTHER THAN CODE SECTIONS) CONSTRUED.

1821. p. 72. Estates of decedents. Limitations. Debts. *Nutt* v. *Brandon,* 702.

1886. p. 589. Meridian. Water contract. *Waterworks Co.* v. *Meridian,* 515.

1890. p. 675. Natchez, etc., R. Co. Sale. *Hinds, etc., Counties* v. *Natchez, etc., R. Co.,* 599.

1894. p. 60. Jurors. Competency. Challenge. *Lewis* v. *State,* 35.

1894. p. 29. Revenue agent. Railroads. Privilege taxes. *Gulf, etc., R. Co.* v. *Adams,* 772.

1898. p. 97. Car service associations. Trusts and combines. Demurrage. *Yazoo, etc., R. Co.* v. *Searles,* 520.

1900. pp. 125, 128. Trusts and combines. Car service associations. Demurrage. *Yazoo, etc., R. Co.* v. *Searles,* 520.

1900. p. 140. Laborer. Landlord. Violating contract. *Ex parte George Harris,* 4.

1904. p. 57. Privilege taxes. Delinquency. Contracts. Amnesty. *North British, etc., Co.* v. *Edwards,* 322.

LAWS OF UNITED STATES CONSTRUED.

Act of May 19, 1828. 4 Stat., 281.
Act of February 16, 1838. 5 Stat., 317.
Executions. Place of sale. *Jones* v. *Rogers,* 802.

LIMITATIONS.

1. ADVERSE POSSESSION. *Elements. Code* 1892, §§ 2730, 2734.

The essential elements which are necessary to constitute an effective adverse possession are a hostile, actual, open, and notorious, exclusive and continuous occupancy for the (Code 1892, §§ 2730, 2734) statutory period. *McCaughn* v. *Young,* 277.

2. SAME. *Actual occupancy. Notice. Hostility.*

One in possession of land, holding under a trustee's deed purporting to convey title thereto, who notified the grantor in the deed of trust that he had purchased and held the land as owner, occupied in hostility to said grantor, although the trustee's sale at which he purchased was void because of some invalidating irregularity. *Ib.*

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LIMITATIONS — *Continued.*

3. ADVERSE POSSESSION. *Wild land. Public acts of ownership.*

Actual occupation, cultivation, and residence are unnecessary to constitute actual possession, in the sense of being adverse to the true owner, where the land is so situate as not to admit of permanent, useful improvement, and the continued claim of possession is evidenced by public acts of ownership. *McCaughn* v. *Young*, 277.

4. SAME. *Payment of taxes. Cutting timber.*

One who, after receiving a deed to wild land not susceptible of occupancy, improvement, or cultivation, paid the taxes for a long term of years, during which the former owner neither paid taxes nor asserted any claim to the land, and used the timber from the land in the same way and to the same extent that he used timber from other lands belonging to him, with the knowledge of the former owner, and placed mortgages of record on the land, and offered the same for sale to the public, possessed the lands adversely to the former owner. *Ib.*

5. SAME. *Actual notice.*

A possession which is adverse and actually known to the true owner is equivalent to a possession which is open and notorious and adverse. *Ib.*

6. SAME. *Abandonment. Absence from state.*

The absence from the state of an adverse claimant of wild land does not constitute an abandonment by him of his possession, so as to break the continuity of the same, where such possession was open, notorious, and with the knowledge of the former owner, and under an instrument constituting color of title, and there was nothing to show an intention on his part to abandon the land, or a claim of title by the former owner during his absence. *Ib.*

7. JUDGMENTS. *Statutes of limitations. Code* 1892, § 2743. *New suit by assignee.*

A suit by the assignee of a judgment, within the period of limitation, is a full compliance with the statute and extends the lien of the judgment, under Code 1892, § 2743, providing that actions on judgments shall be brought within seven years after their rendition. *Street* v. *Smith*, 359.

8. SAME. *Judgment roll. Notice. How lien extended.*

Under Code 1892, § 2743, requiring actions on judgments to be brought within seven years after the rendition thereof:

(*a*) The judgment roll, in case of a recovery in an action by an assignee of the judgment to renew the same, need not show the assign-

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LIMITATIONS — *Continued.*

ment or that the new judgment was based on the original assigned one; and

(*b*) The lien of a judgment can be extended only by the bringing of a suit thereon within the statutory period. *Street* v. *Smith*, 359.

9. JUDGMENTS. *Lien. Apparent bar. Renewal and extension. Code* 1892, § 2462.

Code 1892, § 2462, providing that, where the remedy to enforce any lien which is recorded appears by the record to have been barred by limitations, the lien shall cease, as to creditors and *bona fide* purchasers, unless within six months after such remedy is so barred the fact that such lien has been renewed or extended appears by entry on the record, or by a new instrument filed for record within such time, has no application to judgment liens. *Ib.*

10. APPEALS. *Supreme court. Plea in bar. Code* 1892, § 2752.

A plea in bar of an appeal, based on the statute of limitations, Code 1892, § 2752, providing that appeals to the supreme court shall be prosecuted within two years next after the rendition of the judgment or decree complained of, may be filed in and passed upon by the supreme court. *Farmer* v. *Allen*, 672.

11. SAME. *Decree for sale of land. Erroneous description. Effect on pendency of suit.*

Where in a suit for the sale of lands a decree was rendered, purporting to be final, condemning the lands described in the bill to sale, but erroneously describing them by giving the wrong section number, the decree, while erroneous, is not void, and upon its rendition the suit ceased to be a pending one; and an appeal therefrom was, as to all persons not under disability, barred two years after its rendition. *Ib.*

12. ESTATE OF DECEDENTS. *Insolvency. Suits against.*

There was no statute of Mississippi after the code of 1857 became operative, November 1, 1857, and before the code of 1880 went into effect, November 1, 1880, prohibiting suits upon debts due from the insolvent estate of a decedent, although there was such a statute both before (Laws 1821, p. 72; Hutchinson's Code, p. 668) and afterwards (Code 1880, § 2062; Code 1892, § 1946); hence the statutes of limitation against such debts were not suspended during said period of time by the decree of insolvency. *Nutt* v. *Brandon*, 702.

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LIMITATIONS — *Continued.*

13. EQUITY. *Suit to recover land. Code* 1892, § 2731.

Under Code 1892, § 2731, requiring a person "claiming land in equity" to bring his suit to recover it within ten years after the right to recover it accrues, it is immaterial whether or not defendants have been in adverse possession. *Jones* v. *Rogers,* 802.

14. SAME.

Where, in a bill to remove cloud from title, complainants claiming under their ancestor, who died fifty-five years before, and through an execution sale made to him nine years before that, alleging that "after" such sale divers evil disposed persons set about to cheat and defraud them of the lands, get possession and dispose thereof, and concealed as far as possible all the facts from complainants, who have just of "recent years" learned the facts, does not show that complainants have not had knowledge of the facts for ten years, or have used diligence to discover them, so as to bring them within the exception to Code 1892, § 2731, providing a limitation of ten years from the accrual of the right to recover for suits in equity to recover land. *Ib.*

15. SAME.

The exception to Code 1892, § 2731, requiring a suit in equity to recover lands to be brought within ten years of the accrual of the right to recover, that, in case of a concealed fraud, the right shall not be deemed to have accrued till the fraud shall, or with reasonable diligence might, have been discovered, does not extend the period of limitations against others than the parties to the fraud or their privies; so that a bill alleging merely that "divers persons" combined to defraud does not show a right to sue defendants after the ten years.

16. SAME.

To charge fraud, the specific facts constituting it must be distinctly and definitely averred. *Ib.*

LIS PENDENS.

CHANCERY COURTS. *Jurisdiction. Fraudulent conveyances. Code* 1892, § 503. *Code* 1892, §§ 2782-2789.

The provision of Code 1892, § 503, enlarging the chancery court jurisdiction of bills by creditors to vacate fraudulent conveyances, that the creditor shall have a lien on the property from the filing of his bill, except as against *bona fide* purchasers before the service of process on the defendant, is not affected by Code 1892, §§ 2782-

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LIS PENDENS — *Continued.*

2789, the chapter on *lis pendens,* the two statutes referring to different classes of litigants. *Fernwood, etc., Co.* v. *Meehan-Rounds, etc., Co.,* 54.

MANDAMUS.

1. SUPERVISORS. *School warrants. Specification of use. Code* 1871, § 2025.

Under Code 1871, § 2025, providing that all orders upon the county treasurer for the payment of school moneys shall specify not only the fund upon which they were drawn, but the specific use to which the money was to be applied, school warrants issued thereunder which fail to specify the specific use to which the money was to be applied are void, and mandamus will not lie to enforce the levy of a tax for their payment. *Tunica County* v. *Rhodes,* 500.

2. EMINENT DOMAIN. *Special court. Justice of the peace. Code* 1892, § 1680.

In presiding over a special court of eminent domain, created by Code 1892, § 1680, the justice of the peace acts ministerially rather than judicially, and he may be controlled by mandamus. *Sullivan* v. *Yazoo, etc., R. Co.,* 649.

3. SAME. *Jurisdiction of circuit court. Meeting of eminent domain court. Time and place.*

The circuit court is, however, without power to fix the time and place for the meeting of the eminent domain court, and in awarding mandamus it should simply command the justice of the peace to reconvene the special court and proceed according to law. *Ib.*

MARRIAGE AND DIVORCE.

ALIMONY PENDENTE LITE. *Invalidity of marriage.*

A complainant in a suit for divorce who is the undivorced wife of another is not entitled to recover of the defendant alimony *pendente lite,* and the defendant may show in defense of an application for the same the truth of his answer under oath denying the validity of his marriage to complainant because of her relation as wife to another person. *Reed* v. *Reed,* 126.

MARSHAL.

See MUNICIPALITIES, 2, 3, 4.

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MARSHAL, UNITED STATES.

See Executions.

MASTER AND SERVANT.

1. Railroads. *Death of servant. Instruction. Evidence.*

In an action for death of an employe by the falling of a bridge timber on him while at work under the bridge, the court charged that if the defendant's foreman directed another servant to go on the bridge and *first* take off the nuts on bolts in timbers in the bridge, used to hold said timbers safely, and to knock the bolts out of the timbers, "and *then* put ropes around the timbers and lower them, and that the doing of such acts was negligent," and the foreman was present when such negligent work was performed, and deceased lost his life from a piece of timber falling on him when it was being so removed, defendant was liable. Held, that in the absence of evidence fixing any order in which the taking off the nuts, the knocking out of the bolts, and the lowering of the timbers should be done, the instruction was prejudicially erroneous in the use of the words "first" and "then." *Alabama, etc., R. Co.* v. *Overstreet,* 78.

2. Direction of Supervising Agent. *Construction of testimony. Order of events.*

An order from a bridge foreman to one of his crew engaged in repairing a bridge to take off the nuts and knock the bolts out of a brace and get a line and lower it, is not negligent as to an employe at work under the bridge who is injured by the falling of the brace when left unsupported, since the direction cannot be construed as prescribing the order in which the several acts necessary to the lowering of the brace were to be done. *Ib.*

3. Injuries to Employe. *Assumption of risk.*

While an experienced employe is presumed in law to have assumed the risk ordinarily incident to the employment, yet one who is familiar with the general details of a business may be shown to be a novice in the operation of the machinery by which the business is carried on, and thereby relieved of the presumption. *Bradford* v. *Taylor,* 409.

4. Same. *Vice principal. Fellow-servant.*

Where a servant was injured by the negligence of a vice principal in leaving a protective attachment off of a machine and in starting the machine without giving the servant warning of danger, the acts causing the injury were not, as a matter of law, performed by the vice principal while acting as a fellow-servant of the injured party. *Ib.*

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MASTER AND SERVANT—*Continued.*

5. TORTS OF SERVANT. *Scope of employment. Question of law. Question of fact. Evidence.*

If there be no conflict in the evidence, the question whether a servant whose wrongful act caused injury to a stranger was acting within the scope of his employment, is for the court; but if there be conflict, then the question is for the jury to decide. *Barmore* v. *Vicksburg, etc., R. Co.,* 426.

6. SAME. *Responsibility of master. Departure from service.*

In such case it must be shown, in order for the master to escape liability, that the servant, when the wrongful act complained of was committed, had abandoned his employment and gone about some purpose of his own not incident to his employment. *Ib.*

7. SAME. *Railroads. Concrete case.*

Where an employe of a railroad, whose duty it was to attend to a steam pump, supplying water to a tank, was furnished with a railroad tricycle which he used to gather kindling along the right of way, went to a certain point where it was plentiful, but deviated from his purpose to gather the same after reaching the point, and carried a sick friend on the tricycle therefrom to a station beyond, and while returning, but before reaching the point at which he had taken up his sick friend and deviated from his employment, negligently ran the tricycle against and struck plaintiff, the railroad was liable for his so doing, since the responsibility of the railroad company for his acts attached immediately upon his having accomplished the errand on behalf of his friend and when he started to return to his duty to gather kindling. *Ib.*

8. SAME. *Dangerous instrumentality.*

A master who intrusts to a servant the custody of an appliance which, by reason of its nature or the method of its operation, is dangerous or liable to inflict serious injury upon others, cannot avoid responsibility for injuries inflicted in the operation thereof on the ground that the servant, in the particular act complained of, was acting outside of the scope of his employment. *Ib.*

9. SAME. *Question for jury.*

Whether a railroad tricycle, speeding along the track, is a dangerous instrumentality, within the rule holding the master liable for injuries caused by a servant in the use of a dangerous instrumentality, whether in being where he was on the track he was acting in the scope of his employment or not, is a question for the jury. *Ib.*

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MASTER AND SERVANT — *Continued.*

10. TORTS OF SERVANT. *Railroads. Liability to trespasser on track.*

A railroad is liable for injuries to a trespasser on its track, notwithstanding his contributory negligence, where they are caused by the gross negligence of its servant, who, with knowledge of the trespasser's perilous situation, wantonly injured him. *Barmore* v. *Vicksburg, etc., R. Co.*, 426.

11. TRESPASS. *Verdict against master. Acquittal of guilty servant.*

Where a master and his servant were jointly sued in trespass for the acts of the servant, a verdict, rightfully convicting the master, but wrongfully acquitting the servant, should not be set aside on motion of the master because of the acquittal of the servant. *Illinois, etc., R. Co.* v. *Clarke,* 691.

MUNICIPALITIES.

1. DEDICATION. *Streets. Extent. Acceptance.*

Where the owner impliedly dedicated a strip of land for a street by platting his land into lots and streets, making a map thereof and selling the lots as laid out on the map, the fact that the municipality, for more than ten yers thereafter, used only a portion of the land designated as a street, did not deprive it of the right to use the entire strip for a street when necessary for the convenience of the public. *Indianola, etc., Co.* v. *Montgomery,* 304.

2. OFFICIAL BONDS. *Evidence. Code* 1892, §§ 1793-1797.

Under Code 1892, §§ 1793-1797, regulating the subject, in a suit upon the official bond of a village marshal, a copy of which was filed with the declaration, the copy of the bond so filed and the minute book of the municipality containing a record of the same is admissible in evidence in the absence of a plea denying its execution. *Carlisle* v. *Silver Creek,* 380.

3. SAME.

In such case it is competent to prove by the defendant that he held the official position in question and executed the bond sued upon as his official bond. *Ib.*

4. SAME. *Marshal. Assault in making arrest.*

Although a village marshal may make an arrest without a warrant for an offense committed in his presence, he is liable on his official bond for damages resulting from a brutal and wanton assault in so making an arrest. *Ib.*

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MUNICIPALITIES—*Continued.*

5. SPECIAL ASSESSMENTS. *Front-foot rule. Constitutional law. Constitution* 1890, *sec.* 17.

A municipality may, by legislative authority, charge the costs of paving a sidewalk as a lien on abutting lots of different owners according to the front-foot rule, and so to do is not a taking of private property for public use without compensation. *Wilzinski* v. *Greenville,* 393.

6. CONTRACTS. *Water supply. Estoppel. Laws* 1886, *ch.* 325, *p.* 589. *Rescission of contract.*

Where a city, acting under a statute (Laws 1886; ch. 325, p. 589), empowering it to contract alone for pure and wholesome water, contracted with a water company for a supply of such water, it is not estopped to complain:

(*a*) That the specific water furnished by the company after its plant had been put in operation was not pure and wholesome, although, pending the negotiations which led to the contract, the city accepted samples of the water which the company proposed to furnish, and the water furnished was like the samples; nor

(*b*) That the water company used a reservoir from which the city was furnished impure and unwholesome water, although the contract contemplated that the water should be furnished from a reservoir of the kind so used. *Waterworks Co.* v. *Meridian,* 515.

7. SAME. *Pure and wholesome water.*

A contract requiring the party contracted with to furnish "pure and wholesome water" certainly required the water to be furnished to be reasonably pure and wholesome, whether it was required to be perfectly pure or not. *Ib.*

8. SAME. *Fire protection.*

Where a contract to supply a city with water required the party contracted with to furnish first-class fire protection, the fact that the different sizes of pipe that might be used in constructing the plant were mentioned in the contract did not limit the obligation of the party contracted with to furnish first-class fire protection, nor preclude the city from complaining that the pipes actually laid in pursuance of the contract did not afford first-class protection. *Ib.*

9. SAME. *Extensions of plant.*

Where a city had instituted proceedings to cancel a contract with a water company, the former's act in allowing or even in ordering additions and improvements to be made after suit was brought

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MUNICIPALITIES— *Continued.*

did not estop it from prosecuting the proceedings; but the water company, in making improvements with notice of the pendency of the proceedings, acted as a volunteer. ***Waterworks Co.*** v. ***Meridian***, 515.

10. CRIMINAL LAW. *Carrying concealed weapons. Traveler. Code* 1892, §§ 1026, 1027. *Okolona ordinance.*

A person ceases to be a traveler, within the meaning of a city ordinance, substantially the same as Code 1892, §§ 1026, 1027, making it a misdemeanor to carry a deadly weapon concealed, but excepting those traveling, etc., when he reaches the point of his destination and engages a room at a boarding house or hotel, intending to stay an indefinite time and to return home only after the business for which he made the journey is completed. *Rosamon* v. *Okolona*, 583.

MURDER.

See HOMICIDE.

NEGLIGENCE.

1. STREET RAILROADS. *Motorman. Contributory negligence.*

A motorman who allows his car to run down a sharp grade, past a number of persons engaged in picking up packages on the edge of the track, at the place of a recent accident, with no control of the car, and without sounding an alarm, is guilty of such gross negligence as to justify a verdict for injuries to one of the persons engaged, though the latter may be guilty of contributory negligence. *Rhymes* v. *Jackson, etc., Co.*, 140.

2. RAILROADS. *Injury at crossings. Unlawful speed. Code* 1892, § 3546. *Evidence. Neglect to give signals.*

Evidence that defendant railroad company, without giving any signals, ran an extra train in the night time, at a speed in excess of the lawful rate (Code 1892, § 3546) over frequented street crossings, by which a person was killed, is sufficient to sustain a finding of negligence and to support a verdict for plaintiff against the defendant in an action for the wrongful death of the person so killed. *New Orleans, etc., R. Co.* v. *Brooks*, 269.

3. SAME. *Contributory negligence. Conflict of testimony.*

In such case, there being a controversy touching the conduct of the deceased at the time of the injury, one view of the facts exonerating him for negligence, the question of his contributory negligence was properly submitted to the jury. *Ib.*

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NEGLIGENCE — *Continued.*

4. RAILROADS. *Code* 1892, § 1808. *Prima facie case. Presumption.*
Where, in an action for death, it was shown that the injury was inflicted by the running of defendant's train, the statutory presumption that the injury was the result of defendant's negligence could only by rebutted by clear proof by defendant of facts exonerating it from blame. *New Orleans, etc., R. Co.* v. *Brooks*, 269.

5. MASTER AND SERVANT. *Injuries to employe. Assumption of risk.*
While an experienced employe is presumed in law to have assumed the risk ordinarily incident to the employment, yet one who is familiar with the general details of a business may be shown to be a novice in the operation of the machinery by which the business is carried on, and thereby relieved of the presumption. *Bradford* v. *Taylor*, 409.

6. SAME. *Vice principal. Fellow-servant.*
Where a servant was injured by the negligence of a vice principal in leaving a protective attachment off of a machine and in starting the machine without giving the servant warning of danger, the acts causing the injury were not, as a matter of law, performed by the vice principal while acting as a fellow-servant of the injured party. *Ib.*

NEW TRIAL.

EQUITY. *Judgment fraudulent in effect. Injunction.*
Where the plaintiff's attorney caused defendant's attorney to believe and act upon the idea that a case would not be tried at the next term of the justice's court, but would be continued, a judgment taken by the plaintiff himself, in the absence of the defendant and his attorney at said term, is fraudulent in its effect, and after the defendant, being without fault, has lost the right of appeal, will be enjoined and a new trial will be granted in equity, although the plaintiff's attorney acted without intent to deceive. *Gulf, etc., R. Co.* v. *Flowers*, 633.

NONUSER.

See DEEDS, 5.

OFFICIAL BONDS.

See BONDS, 1.

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ORDINANCES.

See MUNICIPALITIES, 10.

PARTIES.

1. JOINT DEFENDANTS. *Separable controversies. Federal jurisdiction. Removal to federal court.*

In a suit against two defendants, one a resident and the other a non-resident of the state, in the absence of a showing that the resident defendant was joined merely for the purpose of defeating federal jurisdiction:

(*a*) The question whether a separable controversy exists between the plaintiff and the non-resident defendant, and the right of said defendant, predicated thereof, to remove the cause to the federal court, will be determined from the averments of the declaration; and

(*b*) If the declaration fails to show a separable controversy, the granting, at the close of the evidence, of a peremptory instruction to the jury for the resident defendant does not entitle the non-resident then to remove the cause to the federal court. *Illinois, etc., R. Co.* v. *Harris*, 15.

2. SAME. *Concrete case.*

A declaration against two railroad companies alleging that by contract between defendants one of them had the right to use the switches and yard tracks of the other, subject to the control of the latter's yardmaster, that plaintiff, an employe of the former, was injured by the negligence of his employer's conductor and of the yardmaster of the other company in charge of the switches and tracks, does not allege a separable controversy between plaintiff and either of said companies. *Ib.*

3. PARTITION.

A decree confirming an amicable partition of land is invalid which ignores the rights of a joint owner who was a defendant to the partition proceeding in which the decree was rendered and in no way assented to the allotment agreed to by the other parties. *Cotton* v. *Cash*, 29.

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PARTIES — *Continued.*

4. RIGHT TO SUE IN REPRESENTATIVE CAPACITY. *Denial. Code* 1892, § 1797.

A denial in an unsworn answer that the complainant, suing as trustee in bankruptcy, was legally appointed trustee, does not require the complainant to prove his appointment, under Code 1892, § 1797, relieving parties suing in a representative capacity from proving the character in which they sue, unless such character is specially denied under oath; nor will defendant in such case be permitted to predicate a defense of evidence negativing complainant's character. *Thompson* v. *Bank,* 261.

PARTITION.

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2. DISMISSAL. *Defendants' rights.*

Where defendants, because of an erroneous description of land in what was regarded for years as a final decree in a partition suit, seek to have the cause in which it was rendered treated as a pending one, and the complainant asks, in the event it be so treated, that the cause be dismissed, the defendants cannot complain of a decree purporting to dismiss it without prejudice to their rights to bring any other suit they may see proper. *Farmer* v. *Allen,* 672.

PARTNERSHIP.

1. ESTATES OF DECEDENTS. *Surviving partners. Probation of claims. Code* 1892, § 1931.

Code 1892, § 1931, forbidding executors and administrators paying unprobated claims, has no application to a surviving partner administering partnership assets. *Lance* v. *Calhoun,* 375.

2. SAME. *Code* 1892, § 1910 *et seq.*

The fact that a surviving partner is indebted to the estate of his deceased partner does not preclude him from administering the partnership estate as authorized by Code 1892, § 1910 *et seq. Ib.*

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PASSENGERS.

See RAILROADS, 1, 11.

PLATS.

See DEEDS, 6.

PLEADING.

1. ACCIDENT INSURANCE. *Construction of policy. Internal injuries.*
Where an accident from external means results in internal injuries the case is within the terms of an accident policy insuring "against loss effected solely, directly, and independently of all other causes, by bodily injuries sustained through external, violent, and accidental means," and it is unnecessary in a suit upon the policy to specify in the declaration the particular organ hurt. *Pervangher* v. *Union, etc., Co.,* 31.

2. PARTIES. *Right to sue in representative capacity. Denial. Code* 1892, § 1797.
A denial in an unsworn answer that the complainant, suing as trustee in bankruptcy, was legally appointed trustee, does not require the complainant to prove his appointment, under Code 1892, § 1797, relieving parties suing in a representative capacity from proving the character in which they sue, unless such character is specially denied under oath; nor will defendant in such case be permitted to predicate a defense of evidence negativing complainant's character. *Thompson* v. *Bank,* 261.

3. RES ADJUDICATA. *Sale of chattel. Suit for price. Breach of warranty.*
Where the seller sued for the price of a chattel and the buyer pleaded a breach of warranty in defense, a judgment in plaintiff's favor will bar any subsequent action by the buyer for a breach of the warranty. *Miller* v. *Bulkley,* 706.

4. SAME. *Replication to plea of. How plea tried.*
A replication to a plea of *res adjudicata* alleging that the issues tried in the prior action were not those involved in the pending suit presents no issue of fact for a jury, since the plea must be tried upon the record presented. *Ib.*

POLITICAL YEAR.

See COUNTY TREASURER, 4.

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PRINCIPAL AND ACCESSORY.

CRIMINAL LAW. *Homicide. Murder.*

One who aids, assists, and encourages a murder is a principal, and not an accessory; and his guilt in no wise depends upon the guilt or innocence, the conviction or acquittal, of any other alleged participant in the crime. *Dean* v. *State,* 40.

PRINCIPAL AND AGENT.

COMMON CARRIER. *Passenger's baggage. Business papers.*

Papers relating to the business of his principal, placed by an agent in his trunk and carried solely for the purpose of his principal's business, are not baggage, and in the absence of the consent of a common carrier of passengers to accept them as baggage, there being no custom to do so, damages cannot be recovered either for loss, or delay in the carriage, of such papers. *Y. & M. V. R. Co.* v. *Ga. Home Ins. Co.,* 7.

PRIVILEGE TAXES.

1. CONSTITUTIONAL LAW. *Constitution* 1890, *sec.* 97. *Reviving barred remedy. Contractual limitation.*

Constitution 1890, sec. 97, prohibiting the legislature to revive any remedy which may have been barred by lapse of time, or by any statute of limitation of this state, has no application to the terms of a contract by which the parties agree that an action shall not be brought thereon after a specified time, but relates wholly to such limitation of time in which suits may be brought as is recognized by the law of the state. *North British, etc., Co.* v. *Edwards,* 322.

2. DELINQUENCY. *Disability to sue. Code* 1892, § 3401. *Amnesty act. Laws* 1904, *ch.* 75, *p.* 57.

Parties who were disabled to maintain suits, under Code 1892, § 3401, because of delinquency in the payment of privilege taxes, could avail of the amnesty act of 1904 (Laws 1904, ch. 75, p. 57), and remove such disability where suit was pending when the act was passed, although the contract of fire insurance sued upon provided that no suit could be maintained upon it unless instituted within one year from the fire and more than a year had elapsed between the date of the fire and passage of the amnesty act. *Ib.*

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PRIVILEGE TAXES — *Continued.*

3. RAILROADS. *Back taxes. Classification.*

Acts 1898, p. 23, ch. 5, sec. 66, providing that the railroad commission shall annually, on or before the first Monday in August, classify the several railroads for the purpose of privilege taxation, is prospective only, and hence gives the commission no power to back classify. *Gulf, etc., R. Co.* v. *Adams,* 772.

4. SAME. *Revenue agent. Laws* 1894, *p.* 29.

The revenue agent has no power under Acts 1894, pp. 29, 30, ch. 34, secs. 2-4, to have railroads back classified for the purpose of privilege taxation, inasmuch as the sections refer to *ad valorem* taxation exclusively, and hence the power of the railroad commission to back classify railroads for the purpose of privilege taxation cannot be inferred therefrom. *Ib.*

5. SAME.

The tax on railroad franchises at the rate of $10 per mile, without regard to varying conditions, the volume of business, the earning capacity, or the value of the roads on which it is levied, is not a property tax, but a privilege tax proper. *Ib.*

6. AD VALOREM ASSESSMENT. *Code* 1892, § 3877.

The supreme court will take judicial notice that railroads were assessed and have paid *ad valorem* taxes for previous years, pursuant to Code 1892, § 3877, making it the duty of the railroad assessors, in fixing assessments of the roads, to take into consideration the value of their franchises. *Ib.*

7. SAME.

Under Code 1892, § 3877, requiring the railroad assessors, in fixing assessments of railroads for *ad valorem* taxation, to take into consideration the value of their franchises, the value of the right of the companies to operate their railroads in the manner, on the conditions, and with the powers prescribed and granted in their several charters is meant. *Ib.*

8. SAME.

Where the railroad assessors have assessed railroads for *ad valorem* taxes pursuant to Code 1892, § 3877, making it their duty to take the value of their franchises into consideration, and the taxes have been paid, the assessment is conclusive, in the absence of fraud; and hence, assuming that the privilege tax on railroads is a property tax, the railroads cannot be classified for the years in question, and made to pay the privilege tax which had not been assessed against them, when fraud is not charged. *Ib.*

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PRIVILEGE TAXES — *Continued.*

9. AD VALOREM ASSESSMENT. *Laws* 1898, *p.* 23.

Under Acts 1898, p. 23, ch. 5, sec. 66, empowering the railroad commission to classify railroads for privilege taxes according to their charter exemptions from state supervision and gross earnings, the classification is a judicial act, and where certain roads were classed for a series of years without reference to charter exemptions, they could not thereafter be back classified as roads claiming exemption from state supervision for the purpose of privilege taxation in the years for which they had previously been otherwise classified.

PROBATION OF CLAIMS.

See ESTATES OF DECEDENTS, 1.

PROCESS.

1. PRACTICE. *Non-resident defendants. Code* 1892, § 3421. *When service complete.*

A non-resident defendant in chancery, under Code 1892, § 3421, regulating process by publication and mailing for such defendants, is not served with process so as to authorize proceedings against him as if personally served until the completion of the required publication, and, in case his post office be known, the proper mailing of a summons to him. *Fernwood, etc., Co.* v. *Meehan-Rounds, etc., Co.,* 54.

2. SAME. *Concrete case.*

Where, in a suit under Code 1892, § 503, to set aside a conveyance as fraudulent, a *lis pendens* notice was filed under Code 1892, §§ 2782, 2789, but the grantee in the deed, a non-resident defendant, without actual notice of the suit, conveyed the property to a *bona fide* purchaser before the completion of the publication and mailing of process against him, under Code 1892, § 3421, the purchaser will be protected in his title. *Ib.*

3. JUSTICE OF THE PEACE. *Judgment. Service. Time.*

The judgment of a justice of the peace rendered in a civil case against a defendant, not a non-resident or transient person, upon less than five days' service of process, is utterly void. (For the exception of non-residents and transient persons, see Code 1892, § 2399.) *Comenitz* v. *Bank,* 662.

4. SAME. *Judgment against two or more. Entirety. Void as to one, void as to all.*

The judgment of a justice of the peace, rendered in a civil case against two or more defendants, is an entirety, and being void as to one, is void as to all of them. *Ib.*

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RAILROADS.

1. COMMON CARRIER. *Passenger's baggage. Business papers. Principal and agent.*

Papers relating to the business of his principal, placed by an agent in his trunk and carried solely for the purposes of his principal's business, are not baggage, and in the absence of the consent of a common carrier of passengers to accept them as baggage, there being no custom to do so, damages cannot be recovered either for loss, or delay in the carriage, of such papers. *Yazoo, etc., R. Co.* v. *Ga. Home Ins. Co.*, 7.

2. JOINT DEFENDANTS. *Separable controversy.*

A declaration against two railroad companies alleging that by contract between defendants one of them had the right to use the switches and yard tracks of the other, subject to the control of the latter's yardmaster, that plaintiff, an employe of the former, was injured by the negligence of his employer's conductor and of the yardmaster of the other company in charge of the switches and tracks, does not allege a separable controversy between plaintiff and either of said companies. *Illinois, etc., R. Co.* v. *Harris*, 15.

3. INJURY TO SERVANT. *Independent corporations.*

The fact that the relation of master and servant existed between the plaintiff and one of two railroad companies defendants, and that said companies are independent corporations, will not prevent plaintiff from maintaining a joint action against them. *Ib.*

4. MASTER AND SERVANT. *Death of servant. Instruction. Evidence.*

In an action for death of an employe by the falling of a bridge timber on him while at work under the bridge, the court charged that if defendant's foreman directed another servant to go on the bridge and first take off the nuts on bolts in timbers in the bridge, used to hold said timbers safely, and to knock the bolts out of the timbers, "and then put ropes around the timbers and lower them, and that the doing of such acts was negligent," and the foreman was present when such negligent work was performed, and deceased lost his life from a piece of timber falling on him when it was being so removed, defendant was liable. Held, that in the absence of evidence fixing any order in which the taking off the nuts, the knocking out of the bolts, and the lowering of the timbers should be done, the instruction was prejudicially erroneous in the use of the words "first" and "then." *Alabama, etc., R. Co.* v. *Overstreet*, 78.

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RAILROADS— *Continued.*

5. DIRECTION OF SUPERVISING AGENT. *Construction of testimony. Order of events.*

An order from a bridge foreman to one of his crew engaged in repairing a bridge to take off the nuts and knock the bolts out of a brace and get a line and lower it, is not negligent as to an employe at work under the bridge who is injured by the falling of the brace when left unsupported, since the direction cannot be construed as prescribing the order in which the several acts necessary to the lowering of the brace were to be done. *Alabama, etc., R. Co.* v. *Overstreet,* 78.

6. DAMAGES. *Future prospects.*

Where, in an action for death, there was no evidence as to decedent's prospects for the future, or as to his expectancy of life, a charge authorizing the jury, on the issue of damages, to consider deceased's physical condition at the time of his death, the wages he was then earning, and his future prospects, and the probable length of his life, was error. *Ib.*

7. CUSTOM. *Evidence.*

In an action for death of a servant by the falling of a bridge timber, refusal to permit defendant to introduce evidence as to the custom in lowering such timbers was error. *Ib.*

8. INJURY AT CROSSINGS. *Unlawful speed. Code* 1892, § 3546. *Evidence. Neglect to give signals.*

Evidence that defendant railroad company, without giving any signals, ran an extra train in the night time, at a speed in excess of the lawful rate (Code 1892, § 3546) over frequented street crossings, by which a person was killed, is sufficient to sustain a finding of negligence and to support a verdict for plaintiff against the defendant in an action for the wrongful death of the person so killed. *New Orleans, etc., R. Co.* v. *Brooks,* 269.

9. SAME. *Contributory negligence. Conflict of testimony.*

In such case, there being a controversy touching the conduct of the deceased at the time of the injury, one view of the facts exonerating him from negligence, the question of his contributory negligence was properly submitted to the jury. *Ib.*

10. SAME. *Code* 1892, § 1808. *Prima facie case. Presumption.*

Where, in an action for death, it was shown that the injury was inflicted by the running of defendant's train, the statutory presumption that the injury was the result of defendant's negligence could only be rebutted by clear proof by defendant of facts exonerating it from blame. *Ib.*

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RAILROADS — *Continued.*

11. PASSENGERS. *Blind person. Apparent incapacity. Actual capacity. Duty of ticket agent. Arbitrary refusal to carry. Damages.*

Where a blind person presents himself to a railroad ticket agent and offers to purchase a ticket entitling him to travel on the company's train:

(*a*) Its sale may be denied him if he be unable to care for himself or liable to require extra attention from the carrier or the passengers; but

(*b*) Where a person seemingly disabled is in fact, to the knowledge of the carrier, able to travel alone, without requiring extra care or attention, transportation must be furnished him; and

(*c*) It is the duty of the agent to listen to explanations made by and in behalf of the applicant touching his experience and capacity to travel alone, and to judge of his competency in the light of the facts then made known; and

(*d*) If the carrier, with knowledge or reasonable ground to believe that the applicant is in fact able to travel alone, without requiring extra care or attention, arbitrarily, willfully, wantonly, wrongfully, and unreasonably deny him transportation, the carrier will be liable to him for compensatory damages and, in the discretion of the jury, to punitive damages; and

(*e*) The reasonableness or unreasonableness of an agent's refusal to sell him a ticket, after explanation of his ability to travel alone, is a question for the jury to determine. *Illinois, etc., R. Co.* v. *Smith,* 349.

12. CATTLE GUARDS. *Code* 1892, § 3561.

It cannot be judicially declared that the maintenance of a cattle guard of a specified pattern is a compliance with Code 1892, § 3561, making it the duty of railroad companies to maintain proper cattle guards, where their tracks pass through inclosed land, upon proof that the guard is less dangerous to the traveling public than any other kind, but ineffectual to turn cattle. *Yazoo, etc., R. Co.* v. *Harrington,* 366.

13. SAME. *Constitutional law. U. S. Const., XIV. amendment.*

Code 1892, § 3561, requiring railroads to maintain cattle guards where their tracks pass through inclosed land, is not violative of the fourteenth amendment to the constitution of the United States as depriving the companies of property without due process of law. *Ib.*

14. MASTER AND SERVANT. *Torts of servant. Scope of employment. Question of law. Question of fact. Evidence.*

If there be no conflict in the evidence, the question whether a servant whose wrongful act caused injury to a stranger was acting within

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RAILROADS — *Continued.*

the scope of his employment, is for the court; but if there be conflict, then the question is for the jury to decide. *Barmore* v. *Vicksburg, etc., R. Co.,* 426.

15. MASTER AND SERVANT. *Responsibility of master. Departure from service.*

In such case it must be shown, in order for the master to escape liability, that the servant, when the wrongful act complained of was committed, had abandoned his employment and gone about some purpose of his own not incident to his employment. *Ib.*

16. SAME. *Railroads. Concrete case.*

Where an employe of a railroad, whose duty it was to attend to a steam pump, supplying water to a tank, was furnished with a railroad tricycle which he used to gather kindling along the right of way, went to a certain point where it was plentiful, but deviated from his purpose to gather the same after reaching the point, and carried a sick friend on the tricycle therefrom to a station beyond, and while returning, but before reaching the point at which he had taken up his sick friend and deviated from his employment, negligently ran the tricycle against and struck plaintiff, the railroad was liable for his so doing, since the responsibility of the railroad company for his acts attached immediately upon his having accomplished the errand on behalf of his friend and when he started to return to his duty to gather kindling. *Ib.*

17. SAME. *Dangerous instrumentality.*

A master who intrusts to a servant the custody of an appliance which, by reason of its nature or the method of its operation, is dangerous or liable to inflict serious injury upon others, cannot avoid responsibility for injuries inflicted in the operation thereof on the ground that the servant, in the particular act complained of, was acting outside of the scope of his employment. *Ib.*

18. SAME. *Question for jury.*

Whether a railroad tricycle, speeding along the track, is a dangerous instrumentality, within the rule holding the master liable for injuries caused by a servant in the use of a dangerous instrumentality, whether in being where he was on the track he was acting in the scope of his employment or not, is a question for the jury. *Ib.*

19. SAME. *Railroads. Liability to trespasser on track.*

A railroad is liable for injuries to a trespasser on its track, notwithstanding his contributory negligence, where they are caused by the gross negligence of its servant, who, with knowledge of the trespasser's perilous situation, wantonly injured him. *Ib.*

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RAILROADS — *Continued.*

20. TRUSTS AND COMBINES. *Code* 1892, § 4437. *Laws* 1900, *ch.* 88, *p.* 125. *Contracts. Construction.*

In determining whether a contract violates public policy as evidenced by the anti-trust statutes (Code 1892, § 4437; Laws 1900, ch. 88, p. 125), the courts will consider the nature of the business contemplated and the tendency of the contract as affecting the public, rather than the nature of the parties, whether corporations or individuals. *Yazoo, etc., R. Co.* v. *Searles*, 520.

21. SAME. *Test of a trust.*

All combinations or contracts, without regard to their purpose, intent, or effect, by which the control of business is placed within the power of trustees or persons other than the contracting parties, are not trusts within the meaning of the statute, Code 1892, § 4437; Laws 1900, ch. 88, p. 125, defining trusts and prohibiting contracts in restraint of trade, but the test of a trust and the essential of its existence is that the contract or combination be on account of its actual results obnoxious to public policy, or be in itself and in its necessary effect inimical to the public welfare. *Ib.*

22. SAME. *Forms not controlling.*

Courts will look through the form of an association in order to ascertain its character, and will judge of its nature not merely by its promulgated rules, but by its actual operation, and will decide the question of its legality or illegality according to the true nature and probable effect of the arrangement, without special regard to the form which has been assumed in the particular instance. *Ib.*

23. SAME. *Rules.*

If the form of a combination is legal, and its aim and purposes such as the law will uphold, it will not be denounced as illegal from the fact alone that the objects for which it was entered into are occasionally effectuated by rules which are only invoked as it becomes necessary to cope with unforeseen contingencies as they arise. *Ib.*

24. SAME. *Practical operation.*

Where a contract or understanding is not of itself inimical to the public welfare or in contravention of express statute, it will be upheld unless it is so operated as to become oppressive by infringing upon the rights of private individuals, or unless it works to the detriment of the general public. *Ib.*

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RAILROADS—*Continued.*

25. TRUSTS AND COMBINES. *Car service associations. Failure to pay. No service.*

A rule of a car service association, providing that where consignees refuse to pay, or unnecessarily defer settlement of, car service charges, cars will not be switched to the private sidings of such persons, but deliveries will only be made on public delivery tracks of the company, is legal and enforceable. *Yazoo, etc., R. Co.* v. *Searles*, 520.

26. SAME. *Refusal to pay. Unadjusted claim.*

The fact that a consignee has an unadjusted claim for damages against a railroad is no valid excuse for his refusal to pay demurrage on cars unduly detained by him. *Ib.*

27. SAME. *Reasonable orders. Wrongful enforcement.*

Where an order of a car service association is reasonable in its general tenor and effect, the question whether it was rightfully invoked in a particular instance does not affect the question of whether the association is or is not a trust or combine. *Ib.*

28. SAME. *Railroads. Extra services. Extra charges.*

Railroads are entitled to charge and receive extra compensation for extra services rendered after the arrival of freight at its destination, such as reconsignment charges, car service, or switching charges, demurrage, and the like. *Ib.*

29. SAME. *Lawful agreement. Unlawful use.*

An agreement, lawful in its character and purpose, is not rendered unlawful because some of its members attempt to put it to an unlawful use. *Ib.*

30. SAME. *Facts considered. Course pursued not arbitrary.*

A rule of the railroad commission forbids railroads to discriminate in demurrage rates, and requires them to collect demurrage at all places on their lines if they collect at any place. The operation of the rule is to be suspended by the commission when justice demands. Other rules of the commission regulate car service associations. Prior to the promulgation of the latter set of rules, a car service association had a rule providing for the withdrawal of service on private sidings in case of the failure of consignees to promptly settle bills for car service charges. Under these rules, where a consignee refused to recognize the car service association, and refused to pay car service or demurrage, the withdrawal of car service on his siding by the car service association did not constitute such oppressive and arbitrary action as to constitute the car service association an illegal trust and combine or criminal conspiracy inimical to the public welfare. *Ib.*

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RAILROADS — *Continued.*

31. TRUSTS AND COMBINES. *Evidence of legislative intent. Laws* 1898, *ch.* 82, *p.* 97.

The fact of the enactment of Acts 1898, p. 97, ch. 82, making car service associations subject to the control and supervision of the railroad commission, is indicative of a legislative intent that such associations shall not be deemed within the inhibition of Code 1892, § 4437, defining trusts and declaring them illegal, or of Acts 1900, p. 125, ch. 88, which accomplishes the same purpose. *Yazoo, etc., R. Co.* v. *Searles*, 520.

32. SAME. *Laws* 1900, *ch.* 88, *p.* 28, *sec.* 7. *Proof.*

Under Acts 1900, p. 128, ch. 88, sec. 7, providing that proof that a party has been compelled to pay more for services by reason of the unlawful act or agreement of a trust than he would have been compelled to pay except for such unlawful act or agreement shall be conclusive proof of damage, mere proof that one has been compelled to pay more for a service than his competitors were paying for the same service, without proof that such excessive payment was due to the alleged wrongful act and agreement complained of, does not constitute the required proof of damage. *Ib.*

33. SAME. *Car service association. Not a trust.*

A car service association, which is merely the agent of different railroads in the enforcement of car service and demurrage charges, and which is not only without power to control the railroads intrusting their business to it, but cannot even fix the demurrage charges which it is its duty to assess, is not an illegal trust or combine, within the prohibition of Acts 1900, p. 125, ch. 88, defining such trusts as combinations or agreements by which any other persons than the contracting parties and their proper officers or employes shall have the power to conduct the control and management of their business. *Ib.*

34. SAME. *Bills of lading. Rules contained in.*

Rules contained in bills of lading, imposing demurrage for dilatory unloading of cars, are binding upon consignees, though they be in fact ignorant of their existence. *Ib.*

35. SAME. *When railroad may refuse service.*

While it is the duty of a railroad to switch and place cars coming from its own line, or tendered to it with proper transfer switching charges by any connecting line, and it cannot excuse itself from the performance of its duty by the existence of disputes as to the correctness of charges withheld pending adjustment, yet it is war-

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RAILROADS — *Continued.*

ranted in refusing to switch and place cars at the warehouse of a consignee who has not only arbitrarily refused to pay demurrage charges accrued in the past, but has expressed his intention of persisting in his refusal even if such charges be justly incurred in the future. *Yazoo, etc., R. Co.* v. *Searles,* 520.

36. TRUSTS AND COMBINES. *Rule for collection of demurrage.*

A car service rule requiring prompt payment of demurrage charges and providing that no claim of mistake or overcharge will be considered unless the bill for demurrage is first promptly paid, does not subject consignees to a liability to imposition in the collection of demurrage, but leaves them free to prosecute actions for damages for the collection of overcharges or for refusing to render services when no demurrage is due or payment thereof has not been unduly delayed. *Ib.*

37. SAME. *Assessment of demurrage. Burden of proof.*

In a suit by a consignee for damages for extorting excessive demurrage charges or for withholding car service under a pretended claim for demurrage the burden is on the carrier to prove the proper assessment of unpaid demurrage, and that payment thereof had been refused or unduly delayed, within the terms of a rule requiring the prompt payment of demurrage charges. *Ib.*

38. SAME. *Account for demurrage.*

The fact that a bill for demurrage charges due a railroad was made out by direction of a car service association, to which the railroad intrusted its business in the collection of demurrage, and on its letter heads, does not justify the consignee in refusing to pay such demurrage. *Ib.*

39. CATTLE GUARDS. *Code* 1892, § 3561. *Interior crossings.*

Where a railroad company constructed a sufficient stock gap and cattle guard, both where its track entered and where it passed out of inclosed lands, used as one tract and belonging to one person:

(*a*) It complied with Code 1892, § 3561, making it the duty of every railroad company to construct and maintain all necessary or proper stock gaps and cattle guards where its track passes through inclosed land; and

(*b*) It cannot be required to construct other stock gaps or cattle guards at a place within the inclosure where it had, for the convenience of the owner, constructed a crossing over its track. *Gulf, etc., R. Co.* v. *Ellis,* 586.

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RAILROADS — *Continued.*

40. CORPORATIONS. *Sale of franchise. Purchaser. Want of legislative power. Stockholders.*

Where a corporation, being authorized to sell, sells its franchise to another corporation, the stockholders of the seller cannot avoid the sale because of the want of power in the purchaser to buy. *Hinds, etc., Counties* v. *Natchez, etc., R. Co.,* 599.

41. SAME. *Laws* 1890, *ch.* 502, *p.* 675. *Natchez, Jackson & Columbus Railroad Company. Power to sell.*

The Natchez, Jackson & Columbus Railroad Company was empowered, under Laws 1890, ch. 502, p. 675, to sell its railroad franchises and property by a vote of a majority of its stockholders without the consent of the minority. *Ib.*

42. SAME. *Stockholders. Power of majority. Sale.*

A private corporation, doing an unprofitable business, may sell its entire assets upon a vote of the majority of its stockholders, even in the absence of an express enabling statute; and with such a statute the majority may sell all of the assets of an insolvent public corporation. *Ib.*

43. SAME. *Counties. Consenting to sale of stock.*

A county which owned a majority of the stock of a railroad for eleven years, and, with another county, controlled the road for five years longer, and which was represented by the president of its board of supervisors at every meeting of the stockholders during the entire period, and participated, through its representative, in the issuance, hypothecation, and sale of stock to a certain person, could not question the validity of the stock so issued, in the hands of its holder. *Ib.*

44. SAME. *Meetings. Minority bound by acts of majority.*

A stockholder in a corporation is bound by the act of a majority where due notice of a stockholders' meeting was given, although he was absent and unrepresented at the meeting. *Ib.*

45. SAME. *Counties. Railway stocks. Non-governmental capacity.*

Counties which issue bonds for railway stock do not own and hold the stock in a governmental capacity, but hold it in the same way and subject to the same rights and obligations as private corporations and individuals. *Ib.*

46. CONDEMNATION. *Former proceeding. Res adjudicata.*

A railroad company, having the right to condemn private property for public use, is not precluded from so doing by the fact that a

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RAILROADS — *Continued.*
former proceeding to condemn the same land had been dismissed by the justice of the peace, and that a petition for mandamus to require the justice of the peace to proceed in the cause, filed in the name of the state on the relation of the attorney-general, for the railroad's benefit, had been dismissed on demurrer in the circuit court. *Sullivan* v. *Yazoo, etc., R. Co.*, 649.

47. MASTER AND SERVANT. *Verdict against master. Joint defendants.*
Where a master and his servant were jointly sued in trespass for the acts of the servant, a verdict, rightfully convicting the master, but wrongfully acquitting the servant, should not be set aside on motion of the master because of the acquittal of the servant. *Illinois, etc., R. Co.* v. *Clarke*, 691.

48. RAILROAD COMMISSION. *Inferior tribunal. Code* 1892, § 90. *Certiorari.*
The railroad commission is an inferior tribunal, within the meaning of Code 1892, § 90, providing that *certiorari* may be had to review the judgment of all tribunals inferior to the circuit court. *Gulf, etc., R. Co.* v. *Adams*, 772.

49. SAME. *Code* 1892, § 89.
Certiorari lies to correct mistaken findings of fact by the railroad commission induced by an error of law apparent on the record, the finding of a fact contrary to law, or the making of an order beyond its power, although Code 1892, § 89, confines the courts on *certiorari* to questions of law appearing on the face of the record and proceedings. *Ib.*

50. SAME. *Privilege taxes. Railroads. Classification. Laws* 1898, *ch.* 5, *p.* 23, *sec.* 66.
The provision of sec. 66, Laws 1898, ch. 5, p. 23, empowering the railroad commission, annually on the first Monday of August, to classify railroads for privilege taxes according to their charter exemption claims and gross earnings, if constitutional:
(*a*) Is prospective only and gives the commission no power to back classify; and
(*b*) The power conferred is judicial in its nature; hence
(*c*) Where certain railroads were classified for a number of years, without reference to charter exemptions from state supervision, they could not thereafter, for the purpose of privilege taxation for the same years, be back classified as railroads claiming exemption from state supervision. *Ib.*

51. SAME. *State revenue agent. Laws* 1894, *ch.* 34, *p.* 29, *secs.* 2-4.
The state revenue agent has no power, under Laws 1894, ch. 34, p. 29, secs. 2, 3, 4, to cause railroads to be back classified for the pur-

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RAILROADS — *Continued.*

pose of privilege taxation, since said sections refer to *ad valorem* taxation only, and the power of the railroad commission to back classify railroads for the purpose of privilege taxation cannot be inferred therefrom. *Gulf, etc., R. Co.* v. *Adams*, 772.

52. RAILROAD COMMISSION. *Railroads. Per mile tax.*

A tax of a certain amount per mile on railroad franchises, without regard to varying conditions or values, is not a property tax, but a privilege tax proper. *Ib.*

53. SAME. *Ad valorem taxes. Code* 1892, § 3877.

Under Code 1892, § 3877, requiring the railroad assessors, in fixing assessments of railroads for *ad valorem* taxation, to take into consideration the value of their franchises, the value of the right of the companies to operate their railroads in the manner, on the conditions, and with the powers prescribed and granted in their several charters, is meant. *Ib.*

54. SAME. *Assessment. Res adjudicata.*

Where the railroad assessors have assessed railroads for *ad valorem* taxes pursuant to Code 1892, § 3877, making it their duty to take the value of their franchises into consideration, and the taxes have been paid, the assessment is conclusive, in the absence of fraud; and hence, assuming that the privilege tax on railroads is a property tax, the railroads cannot be classified for the years in question, and made to pay the privilege tax which had not been assessed against them, fraud not being charged. *Ib.*

55. SAME. *Judicial notice.*

The court will take judicial notice that railroads were assessed and have paid *ad valorem* taxes for previous years, pursuant to Code 1892, § 3877, making it the duty of the railroad assessors, in fixing assessments of the roads, to take into consideration the value of their franchises. *Ib.*

RAILROAD COMMISSION.

1. INFERIOR TRIBUNAL. *Code* 1892, § 90. *Certiorari.*

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RAILROAD COMMISSION — *Continued.*

2. INFERIOR TRIBUNAL. *Code* 1892, § 89.

Certiorari lies to correct mistaken findings of fact by the railroad commission induced by an error of law apparent on the record, the finding of a fact contrary to law, or the making of an order beyond its power, although Code 1892, § 89, confines the courts on *certiorari* to questions of law appearing on the face of the record and proceedings. *Gulf, etc., R. Co.* v. *Adams*, 772.

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4. SAME. *State revenue agent. Laws* 1894, *ch.* 34, *p.* 29, *secs.* 2-4.

The state revenue agent has no power, under Laws 1894, ch. 34, p. 29, secs. 2, 3, 4, to cause railroads to be back classified for the purpose of privilege taxation, since said sections refer to *ad valorem* taxation only, and the power of the railroad commission to back classify railroads for the purpose of privilege taxation cannot be inferred therefrom. *Ib.*

5. SAME. *Railroads. Per mile tax.*

A tax of a certain amount per mile on railroad franchises, without regard to varying conditions or values, is not a property tax, but a privilege tax proper. *Ib.*

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Under Code 1892, § 3877, requiring the railroad assessors, in fixing assessments of railroads for *ad valorem* taxation, to take into consideration the value of their franchises, the value of the right of the companies to operate their railroads in the manner, on the conditions, and with the powers prescribed and granted in their several charters, is meant. *Ib.*

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RAILROAD COMMISSION — *Continued.*

7. INFERIOR TRIBUNAL. *Assessment. Res adjudicata.*

Where the railroad assessors have assessed railroads for *ad valorem* taxes pursuant to Code 1892, § 3877, making it their duty to take the value of their franchises into consideration, and the taxes have been paid, the assessment is conclusive, in the absence of fraud; and hence, assuming that the privilege tax on railroads is a property tax, the railroads cannot be classified for the years in question, and made to pay the privilege tax which had not been assessed against them, fraud not being charged. *Gulf, etc., R. Co.* v. *Adams*, 772.

8. SAME. *Judicial notice.*

The court will take judicial notice that railroads were assessed and have paid *ad valorem* taxes for previous years, pursuant to Code 1892, § 3877, making it the duty of the railroad assessors, in fixing assessments of the roads, to take into consideration the value of their franchises. *Ib.*

RECEIVER.

CORPORATIONS. *Insolvency. Laborers' wages. Preference claims.*

Where a receiver is appointed for an insolvent corporation, whether public or private, and its entire property is placed in his hands, he will be required to pay the wages of laborers who rendered service shortly before his appointment and whose labor was necessary to continue the business of the corporation and preserve its property, in preference to both ordinary and mortgage creditors. *LeHote* v. *Boyet,* 636.

RECORD AND REGISTRATION.

1. FRAUDULENT CONVEYANCES. *Withholding deed from record. Agreement. Fictitious credit.*

The withholding from record of a deed:

(*a*) Is not fraudulent as against the creditors of the grantor where it results from mere inattention, indifference, or agreement, without fraudulent purpose to give the grantor a fictitious credit; but

(*b*) For a bank to withhold a deed to it from record by agreement with its president, the grantor, in order to give him a fictitious credit, is a fraud in fact as against the president's creditors who became such without notice of the deed, and the bank's claim thereunder will be postponed to the rights of such creditors. *Johnston* v. *Bank,* 234.

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RECORD AND REGISTRATION — *Continued.*

2. HUSBAND AND WIFE. *Conveyances. Code* 1892, § 2294. *Creditors.*

A conveyance executed for value and in good faith by a husband to his wife cannot be avoided by a creditor of the husband whose debt was unsecured at the time, under Code 1892, § 2294, providing that a conveyance between husband and wife shall not be valid as against a third person unless it be filed for record, where it was filed for record before the creditor obtained a lien. *Green* v. *Weems*, 566.

REMOVAL OF CAUSES.

1. PARTIES. *Joint defendants. Separable controversies. Federal jurisdiction. Removal to federal court.*

In a suit against two defendants, one a resident and the other a non-resident of the state, in the absence of a showing that the resident defendant was joined merely for the purpose of defeating federal jurisdiction:

(*a*) The question whether a separable controversy exists between the plaintiff and the non-resident defendant, and the right of said defendant, predicated thereof, to remove the cause to the federal court, will be determined from the averments of the declaration; and

(*b*) If the declaration fails to show a separable controversy, the granting, at the close of the evidence, of a peremptory instruction to the jury for the resident defendant does not entitle the non-resident then to remove the cause to the federal court. *Illinois, etc., R. Co.* v. *Harris*, 15.

2. SAME. *Concrete case.*

A declaration against two railroad companies alleging that by contract between defendants one of them had the right to use the switches and yard tracks of the other, subject to the control of the latter's yardmaster, that plaintiff, an employe of the former, was injured by the negligence of his employer's conductor and of the yardmaster of the other company in charge of the switches and tracks, does not allege a separable controversy between plaintiff and either of said companies. *Ib.*

3. FEDERAL COURTS. *Actions removable. Cancelling clouds on title.*

A suit to remove clouds from title to land is not within the exclusive jurisdiction of the state court, and may be removed, the citizenship of the parties justifying it, into the federal court. *Day* v. *Oatis*, 128.

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REMOVAL OF CAUSES — *Continued.*

4. FEDERAL COURTS. *Petition for removal. Demurrer.*
   Where the complainant demurred to the defendant's petition to remove the cause to the federal court, he thereby admitted the truth of the petition, and cannot upon appeal justify a judgment denying the removal by reference to the evidence. *Day* v. *Oatis*, 128.

5. SAME. *Diverse citizenship.*
   The diverse citizenship which must exist both at the time an action is begun in the state court and at the time a petition for removal is filed, in order to entitle the petitioner to have the cause removed, is a diversity of citizenship existent in fact, and not one merely shown to exist from the pleadings. *Ib.*

6. SAME. *Disclaimer of interest by resident.*
   Where a suit to remove a cloud from complainant's title is brought against a resident and a non-resident, and the resident disclaims interest, thereby retiring from the suit, the non-resident may procure the removal of the cause to the federal court. *Ib.*

REMOVAL OF COUNTY SEAT.

See COUNTY SEAT, 1, 2, 3, 4.

RES ADJUDICATA.

1. EMINENT DOMAIN. *Former proceeding.*
   A railroad company, having the right to condemn private property for public use, is not precluded from so doing by the fact that a former proceeding to condemn the same land had been dismissed by the justice of the peace, and that a petition for mandamus to require the justice of the peace to proceed in the cause, filed in the name of the state on the relation of the attorney-general, for the railroad's benefit had been dismissed on demurrer in the circuit court. *Sullivan* v. *Yazoo, etc., R. Co.*, 649.

2. SALE OF CHATTEL. *Suit for price. Breach of warranty.*
   Where the seller sued for the price of a chattel and the buyer pleaded a breach of warranty in defense, a judgment in plaintiff's favor will bar any subsequent action by the buyer for a breach of the warranty. *Miller* v. *Bulkley*, 706.

3. SAME. *Replication to plea of. How plea tried.*
   A replication to a plea of *res adjudicata* alleging that the issues tried in the prior action were not those involved in the pending suit presents no issue of fact for a jury, since the plea must be tried upon the record presented. *Ib.*

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RES ADJUDICATA — *Continued.*

4. COUNTY SEAT. *Removal. Injunction. Compromise decree.*

A decree dismissing a suit to restrain the removal of a county seat, resulting from a compromise, is not a bar to a similar suit by other persons not parties nor privies to, nor consulted in, the previous suit. *Simpson County* v. *Buckley,* 713.

REWARDS.

FLEEING MURDERER. *Code* 1892, § 1387. *Construction. Sheriff of another state. Legal duty.*

An Arkansas sheriff, arresting in that state a person who killed another in this state and who was fleeing before arrest, where he merely notified, by telegraph, the sheriff of the county in which the homicide was committed of the arrest, is not entitled to the reward provided for under Code 1892, § 1387, authorizing the payment of one hundred dollars out of the county treasury for the arrest and delivery up for trial of a fleeing homicide, because:

(*a*) He did not deliver up the prisoner for trial within the meaning of the statute; and

(*b*) He was under legal duty to have made the arrest. *Gould* v. *Chickasaw County,* 123.

ROADS AND STREETS.

1. DEDICATION. *Streets. Extent. Acceptance.*

Where the owner impliedly dedicated a strip of land for a street by platting his land into lots and streets, making a map thereof and selling the lots as laid out on the map, the fact that the municipality, for more than ten years thereafter, used only a portion of the land designated as a street, did not deprive it of the right to use the entire strip for a street when necessary for the convenience of the public. *Indianola, etc., Co.* v. *Montgomery,* 304.

2. MUNICIPALITIES. *Special assessments. Front-foot rule. Constitutional law. Constitution* 1890, *sec.* 17.

A municipality may, by legislative authority, charge the costs of paving a sidewalk as a lien on abutting lots of different owners according to the front-foot rule, and so to do is not a taking of private property for public use without compensation. *Wilzinski* v. *Greenville,* 393.

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SALES.

1. CIPHER TELEGRAMS. *Letters. Evidence. Statute of frauds. Code 1892, § 4229.*

Where a contract for the sale of personal property is evidenced by letters between the parties, fully recognizing the existence and setting forth the terms of the contract, it is immaterial that precedent cipher telegrams do not sufficiently show a sale to take the case out of the statute of frauds. *Bonds* v. *Lipton Co.,* 209.

2. SAME. *Rescission. Tender. Place.*

Where goods were bought with the understanding that they were to be shipped by the seller to the buyer when the buyer thereafter ordered, and the buyer recognized that the seller held the goods on his account, it is not necessary for the seller to tender the goods to the buyer at the latter's place of business after he gives notice that he will not receive them if shipped, in order to hold the buyer liable for a breach of the contract. *Ib.*

3. SAME. *Breach of contract. Custom.*

Where meat contracted for was "smoked meat," it is immaterial that the meat sold upon breach of contract by the seller for the purchaser's account was not smoked, it being shown that the meat was sold to be shipped on the buyer's order, that "smoking" is a process to which meat is submitted, according to the custom of the trade, only immediately prior to shipment, and that the buyer failed to give shipping directions. *Ib.*

4. SAME. *Harmless error. Evidence.*

The erroneous admission in evidence of copies of telegrams is not ground for reversal of a judgment predicated of a contract which the copies were intended to establish, if the contract be otherwise fully proved by competent and undisputed evidence. *Ib.*

5. INTOXICANTS. *Unlawful sale. Evidence. Tricks.*

The sale of a ticket, representing intoxicating liquor, so arranged that as each bottle of liquor might be delivered a hole could be punched in the ticket to show the fact, and the subsequent delivery of one or more bottles of liquor to the holder of the ticket, upon its presentation and punching, is a sale of liquor so delivered, although the money was paid by the purchaser when he received the ticket. *Harper* v. *State,* 338.

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SALES — *Continued.*

6. CORPORATIONS. *Sale of franchise. Purchaser. Want of legislative power. Stockholders.*

Where a corporation, being authorized to sell, sells its franchise to another corporation, the stockholders of the seller cannot avoid the sale because of the want of power in the purchaser to buy. *Hinds, etc., Counties* v. *Natchez, etc., R. Co.,* 599.

7. SAME. *Railroads. Laws* 1890, *ch.* 502, *p.* 675. *Natchez, Jackson & Columbus Railroad Company. Power to sell.*

The Natchez, Jackson & Columbus Railroad Company was empowered, under Laws 1890, ch. 502, p. 675, to sell its railroad franchises and property by a vote of a majority of its stockholders without the consent of the minority.

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A private corporation, doing an unprofitable business, may sell its entire assets upon a vote of the majority of its stockholders, even in the absence of an express enabling statute; and with such a statute the majority may sell all of the assets of an insolvent public corporation.

9. RES ADJUDICATA. *Sale of chattel. Warranty. Suit for price.*

Where the seller sued for the price of a chattel and the buyer pleaded a breach of warranty in defense, a judgment in plaintiff's favor will bar any subsequent action by the buyer for a breach of the warranty. *Miller* v. *Bulkley,* 706.

See EXECUTIONS.

SCHOOLS.

1. CHANCERY PRACTICE. *Waste. Lands. Sixteenth section.*

A bill in equity to recover for waste committed by defendant on sixteenth section school lands, averring simply that the school authorities had leased the land, that the original lessee had assigned the lease, and that defendant held under it, is demurrable for a failure to show the term of the lease, when, where, by whom and to whom it was made. *Adams* v. *Griffin,* 1.

2. FUNDS. *Warrants. Directors. Orders. Code* 1871, § 2024.

Under Code 1871, § 2024, providing that the county treasurer shall not pay warrants drawn on school moneys unless they have been issued by order of the board of school directors, it is necessary to

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SCHOOLS — *Continued.*

sustain a warrant issued thereunder, alleged to have been drawn pursuant to a lost order of the board, to prove not only that an order for the warant had existed, but its contents as well. *Tunica County* v. *Rhodes,* 500.

3. FUNDS. *Specification of use. Code* 1871, § 2025. *Mandamus.*

Under Code 1871, § 2025, providing that all orders upon the county treasurer for the payment of school moneys shall specify not only the fund upon which they were drawn, but the specific use to which the money was to be applied, school warrants issued thereunder which fail to specify the specific use to which the money was to be applied are void, and mandamus will not lie to enforce the levy of a tax for their payment. *Ib.*

4. DEED. *Condition subsequent. Forfeiture. Nonuser.*

A deed conveying land to trustees of a township for school purposes, and for no other use, is not forfeited by a nonuser for two and one-half years, even if the deed be assumed to be upon a condition subsequent. *Buck* v. *Macon,* 580.

SCHOOL FUNDS.

See SCHOOLS, 2.

SCHOOL LANDS.

See SCHOOLS, 1.

STENOGRAPHERS.

1. SALARY. *Opening court. Pretermission of term. Code* 1892, § 4242.

An official stenographer, attending the opening of a term of the circuit court, and ready to perform his official duties, is entitled, under Code 1892, § 4242, regulating the subject, to one week's salary where the term was thereafter pretermitted, although the trial of no case was begun. *Wood* v. *Chickasaw County,* 120.

2. NOTES. *Argument to jury. Reading parts of the testimony.*

In a prosecution for crime the district attorney should not be permitted to read to the jury portions of the testimony as written out by the official stenographer. *Davis* v. *State,* 416.

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STOCK LAW.

1. CONSTITUTIONAL LAW. *Constitution* 1890, *sec.* 33. *Code* 1892, §§ 2055-2059. *Statute. Operation on future contingency.*

The operation of a statute may be dependent upon a future contingency, without being unconstitutional, and §§ 2055-2059, Code 1892, providing for the establishment of stock-law districts by petition and vote, do not violate sec. 33, Constitution 1890, vesting the law-making power of the state in the legislature. *Ormand* v. *White*, 276.

2. BOARD OF SUPERVISORS. *Code* 1892, § 2056. *Petition. Entire county. Part of county.*

An order of the board of supervisors, made upon a petition to have the stock law put in force in the entire county, is utterly void where it purports to put the law in force in only part of the county, under Code 1892, § 2056, regulating the subject. *Bowles* v. *Leflore County*, 387.

3. SAME. *Void order. Appeal.*

A void order of the board of supervisors, purporting to put the stock law in force in a part of the county, is not subject to a proceeding for its reconsideration, at a subsequent term of the board, so as to give the right of appeal from a refusal to vacate it. *Ib.*

STREET RAILROADS.

NEGLIGENCE. *Motorman.*

A motorman who allows his car to run down a sharp grade, past a number of persons engaged in picking up packages on the edge of the track, at the place of a recent accident, with no control of the car, and without sounding an alarm, is guilty of such gross negligence as to justify a verdict for injuries to one of the persons engaged, though the latter may be guilty of contributory negligence. *Rhymes* v. *Jackson, etc., Co.*, 140.

SUPREME COURT.

1. CRIMINAL LAW. *Practice. Record not aided by evidence aliunde.*

The supreme court, on appeal in a criminal case, in passing upon the action of the trial court in denying a continuance, is confined to the record and cannot consider a certified copy of a subpœna issued for a witness nor an affidavit averring that he was present in court during the trial of the case, such papers not having been of record in the court below at the time of the trial. *Whit* v. *State*, 208.

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SUPREME COURT — *Continued.*

2. PRACTICE.

Where a suit was erroneously dismissed in the court below solely on the ground that plaintiff was not entitled to sue in the representative capacity in which he brought the suit, the supreme court will not affirm on the ground that the result was correct on the merits. *Thompson* v. *Bank*, 261.

3. PRACTICE. *Instructions. Striking from record. Filing. Identifying. Code* 1892, § 732.

Where a number of instructions, each having been acted upon by the judge, were attached together and filed by the clerk on the back of a common wrapper, they will not, nor will any one of them, be stricken from the record by the supreme court because each particular piece of paper containing an instruction was not separately marked and filed, on the claim that Code 1892, § 732, regulating the filing of instructions so as to make them a part of the record, had not been complied with. *Gulf, etc., R. Co.* v. *Boswell*, 313.

4. SAME. *Appellant estopped by own instructions.*

Where an appellant asked for and was given an instruction propounding a legal proposition as applicable to the case, he cannot complain of an instruction for the appellee because it propounds the same proposition. *Ib.*

5. RAILROADS. *Licensees. Punitive damages.*

Where, in an action against a railroad for injuries to a licensee in a freight car, an instruction on punitive damages was granted plaintiff which was correctly phrased, the supreme court cannot determine, in the absence of a record containing the facts, whether or not defendant was prejudiced thereby. *Ib.*

6. SAME.

Where, in an action for injuries to a licensee in a railroad car, the statement in the declaration of the injuries inflicted if true would warrant a recovery of compensatory damages in an amount exceeding the verdict, an objection, on appeal, that punitive damages were improperly awarded will not be considered in the absence of all evidence. *Ib.*

7. EVIDENCE. *Objections. Practice.*

Unless objection be made in the trial court to the proof of the contents of a writing by parol evidence, complaint thereof in the supreme court will be unavailing. *Wagner* v. *Ellis*, 422.

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SUPREME COURT — *Continued.*

8. EVIDENCE. *Objections must be seasonable and specific.*

Objections to testimony must be seasonably interposed and made sufficiently specific to present, and not to obscure, the question involved. *Wagner* v. *Ellis*, 422.

9. SAME. *Concrete case.*

A defendant who, without objection, permitted plaintiff to prove the contents of a writing by parol, cannot make the admission of such proof the predicate of an assignment of error in the supreme court, although in the course of the examination of a plaintiff's rebutting witness he made a general objection, which was overruled, to an inquiry touching the contents of the writing. *Ib.*

10. CRIMINAL LAW. *Murder. Previous difficulty. Evidence.*

Where on the trial of a murder case the state designedly proved a previous difficulty between deceased and the accused, it was error to deny defendant the right to show the details of such difficulty. *Brown* v. *State*, 511.

11. SAME. *Supreme court practice.*

In such case, upon appeal, the state cannot claim that the error is non-prejudicial because the record fails to show what the details of the previous difficulty were, where it does show that defendant was not permitted to state to the trial court, even out of the hearing of the jury, what he expected to prove touching the details. *Ib.*

12. APPEAL. *County. Exemption from bond. Code* 1892, § 93. *Demurrer overruled. Code* 1892, § 33.

Where a county prayed for and obtained an appeal without bond, as authorized by Code 1892, § 93, from a decree overruling its demurrer to a bill in equity, under Code 1892, § 33, authorizing an appeal from such a decree, if applied for and perfected within a limited time, the appeal is perfected, within the statutory time limit, where a citation in error was sued out and served within such time. *Harrison County* v. *Rogers*, 578.

13. SAME. *Lapse of time. Motion to docket and dismiss. Failure of appellee to make.*

An appellee who has been served with a citation in error cannot, after the transcript of the record is filed in the supreme court, complain of the lapse of time less than will bar an appeal (two years, Code 1892, § 2752), between the taking of an appeal and the filing of the transcript in the supreme court, if he failed during such time to appear and move to docket and dismiss the cause. *Ib.*

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SUPREME COURT — *Continued.*

14. PRACTICE. *Record. Affidavits.*

An affidavit not a part of the record cannot be considered by the supreme court in aid of the same. *Jenkins* v. *Barber,* 666.

15. APPEALS. *Plea in bar. Statute of limitations. Code* 1892, § 2752.

A plea in bar of an appeal, based on the statute of limitations, Code 1892, § 2752, providing that appeals to the supreme court shall be prosecuted within two years next after the rendition of the judgment or decree complained of, may be filed in and passed upon by the supreme court. *Farmer* v. *Allen,* 672.

16. SAME. *Decree for sale of land. Erroneous description. Effect on pendency of suit.*

Where in a suit for the sale of lands a decree was rendered, purporting to be final, condemning the lands described in the bill to sale, but erroneously describing them by giving the wrong section number, the decree, while erroneous, is not void, and upon its rendition the suit ceased to be a pending one; and an appeal therefrom was, as to all persons not under disability, barred two years after its rendition. *Ib.*

TAXATION.

See PRIVILEGE TAXES.

TAX TITLES.

CONFIRMATION. *Pleadings. Presumption.*

Where a bill for confirmation of a tax title alleges a valid sale of the land for taxes and exhibits as part thereof a tax deed in statutory form, which under the law is *prima facie* evidence of the validity of the assessment and sale, it cannot be assumed on demurrer that the assessment was made under the unconstitutional act of 1888 (Laws, p. 24) because the tax deed recites that the sale was for the taxes assessed for the year 1890. *Coffee* v. *Coleman,* 14.

TELEGRAPH COMPANY.

1. MESSAGES. *Delay in transmission. Damages. Forwarding order.*

The negligent failure by a telegraph company to transmit a message ordering another message to be forwarded to plaintiff, whereby he failed to be notified of the condition of his sick child, does

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TELEGRAPH COMPANY — *Continued.*

not entitle plaintiff to recover the cost of a railroad journey to see the child, since he could have learned the condition of the child by another message. *Hilley* v. *Telegraph Co.*, 67.

2. MESSAGES. *Penalty. Code* 1892, § 4326.

Code 1892, § 4326, imposing a penalty on telegraph companies for transmitting a message incorrectly or for unreasonable delay in the delivery of a message after its transmission, does not apply to a case of failure or delay in transmitting. *Ib.*

TELEPHONE COMPANY.

DAMAGES. *Exemplary. When not recoverable.*

A telephone company is not subjected to liability for exemplary damages by the acts of its manager in removing the telephone from the residence of a patron and requiring him, in sending long-distance messages, to prepay charges and send them from the exchange, when such patron, on the claim of poor service, had refused to pay full rental for his residence telephone, in the absence of evidence of wanton, oppressive, insulting, or willful conduct on the part of the manager. *Cumberland, etc., Co.* v. *Baker*, 486.

TENANTS IN COMMON.

1. CHANCERY PRACTICE. *Waste. Co-tenants. Injunction.*

One tenant in common is entitled to an injunction against his co-tenants to restrain unusual and unreasonable waste, indicating malice and tending to destroy the chief value of the land. *Leatherbury* v. *McInnis*, 160.

2. SAME. *Limitation of injunction.*

Where one tenant in common has enjoined his co-tenant from destroying timber which covers the entire tract and constitutes its chief value, and there is no showing that the timber on one part of the tract is of more value than that on any other part, the injunction should be limited so as to restrain the defendant only from destroying more trees than such proportionate part thereof as corresponds with his interest in the land. *Ib.*

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TENDER.

RESCISSION. *Place.*

Where goods were bought with the understanding that they were to be shipped by the seller to the buyer when the buyer thereafter ordered, and the buyer recognized that the seller held the goods on his account, it is not necessary for the seller to tender the goods to the buyer at the latter's place of business, after he gives notice that he will not receive them if shipped, in order to hold the buyer liable for a breach of the contract. *Bonds* v. *Lipton Co.*, 209.

TREASURERS.

See COUNTY TREASURERS.

TREE CUTTING.

1. FORMS OF ACTION. *Trespass quare clausum fregit. Assumpsit.*

A count in a declaration averring that defendant entered upon plaintiff's land and cut trees and carried them away, and demanding the value of the trees so cut and carried away, and another count in the same declaration, averring that defendant entered upon plaintiff's land and cut and carried away trees, whereby he became liable to pay plaintiff the value of said trees, and undertook and promised the plaintiff to pay him the value of said trees, are both *in assumpsit,* and not trespass *quare clausum fregit. West* v. *McClure,* 296.

2. LOCAL ACTIONS. *Transitory actions.*

An action of *assumpsit* to recover the value of trees cut by defendant on plaintiff's land is not local, but is a transitory action; and the proper court of Tennessee has jurisdiction of such an action for trees cut in this state, the defendant being there found and served with process. *Ib.*

TRESPASS.

1. FORMS OF ACTION. *Tree cutting. Trespass quare clausum fregit. Assumpsit.*

A count in a declaration averring that defendant entered upon plaintiff's land and cut trees and carried them away, and demanding the value of the trees so cut and carried away, and another count in the same declaration, averring that defendant entered upon plaintiff's land and cut and carried away trees, whereby he became

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TRESPASS — *Continued.*

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TRUSTS AND COMBINES.

1. CODE 1892, § 4437. *Laws* 1900, *ch.* 88, *p.* 125. *Contracts. Construction.*

In determining whether a contract violates public policy as evidenced by the anti-trust statutes (Code 1892, § 4437; Laws 1900, ch. 88, p. 125), the courts will consider the nature of the business contemplated and the tendency of the contract as affecting the public, rather than the nature of the parties, whether corporations or individuals. *Yazoo, etc., R. Co.* v. *Searles,* 520.

2. SAME. *Test of a trust.*

All combinations or contracts, without regard to their purpose, intent, or effect, by which the control of business is placed within the power of trustees or persons other than the contracting parties, are not trusts within the meaning of the statute, Code 1892, § 4437, Laws 1900, ch. 88, p. 125, defining trusts and prohibiting contracts in restraint of trade, but the test of a trust and the essential of its existence is that the contract or combination be on account of its actual results obnoxious to public policy, or be in itself and in its necessary effect inimical to the public welfare. *Ib.*

3. SAME. *Forms not controlling.*

Courts will look through the form of an association in order to ascertain its character, and will judge of its nature not merely by its promulgated rules, but by its actual operation, and will decide the question of its legality or illegality according to the true nature and probable effect of the arrangement, without special regard to the form which has been assumed in the particular instance. *Ib.*

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TRUSTS AND COMBINES—*Continued.*

4. CODE 1892, § 4437. *Rules.*

If the form of a combination is legal, and its aim and purposes such as the law will uphold, it will not be denounced as illegal from the fact alone that the objects for which it was entered into are occasionally effectuated by rules which are only invoked as it becomes necessary to cope with unforeseen contingencies as they arise. *Yazoo, etc., R. Co.* v. *Searles*, 520.

5. SAME. *Practical operation.*

Where a contract or understanding is not of itself inimical to the public welfare or in contravention of express statute, it will be upheld unless it is so operated as to become oppressive by infringing upon the rights of private individuals, or unless it works to the detriment of the general public. *Ib.*

6. SAME. *Car service associations. Failure to pay. No service.*

A rule of a car service association, providing that where consignees refuse to pay, or unnecessarily defer settlement of, car service charges, cars will not be switched to the private sidings of such persons, but deliveries will only be made on public delivery tracks of the company, is legal and enforceable. *Ib.*

7. SAME. *Refusal to pay. Unadjusted claim.*

The fact that a consignee has an unadjusted claim for damages against a railroad is no valid excuse for his refusal to pay demurrage on cars unduly detained by him. *Ib.*

8. SAME. *Reasonable orders. Wrongful enforcement.*

Where an order of a car service association is reasonable in its general tenor and effect, the question whether it was rightfully invoked in a particular instance does not affect the question of whether the association is or is not a trust or combine. *Ib.*

9. SAME. *Railroads. Extra service. Extra charges.*

Railroads are entitled to charge and receive extra compensation for extra service rendered after the arrival of freight at its destination, such as reconsignment charges, car service, or switching charges, demurrage, and the like. *Ib.*

10. SAME. *Lawful agreement. Unlawful use.*

An agreement, lawful in its character and purpose, is not rendered unlawful because some of its members attempt to put it to an unlawful use. *Ib.*

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TRUSTS AND COMBINES—*Continued.*

11. CODE 1892, § 4437. *Facts considered. Course pursued not arbitrary.*
A rule of the railroad commission forbids railroads to discriminate in demurrage rates, and requires them to collect demurrage at all places on their lines if they collect at any place. The operation of the rule is to be suspended by the commission when justice demands. Other rules of the commission regulate car service associations. Prior to the promulgation of the latter set of rules, a car service association had a rule providing for the withdrawal of service on private sidings in case of the failure of consignees to promptly settle bills for car service charges. Under these rules, where a consignee refused to recognize the car service association, and refused to pay car service or demurrage, the withdrawal of car service on his siding by the car service association did not constitute such oppressive and arbitrary action as to constitute the car service association an illegal trust and combine or criminal conspiracy inimical to the public welfare. *Yazoo, etc., R. Co.* v. *Searles,* 520.

12. SAME. *Evidence of legislative intent. Laws 1898, ch. 82, p. 97.*
The fact of the enactment of Laws 1898, p. 97, ch. 82, making car service associations subject to the control and supervision of the railroad commission, is indicative of a legislative intent that such associations shall not be deemed within the inhibition of Code 1892, § 4437, defining trusts and declaring them illegal, or Laws 1900, p. 125, ch. 88, which accomplishes the same purpose. *Ib.*

13. SAME. *Laws 1900, ch. 88, p. 128, sec. 7. Proof.*
Under Laws 1900, p. 128, ch. 88, sec. 7, providing that proof that a party has been compelled to pay more for services by reason of the unlawful act or agreement of a trust than he would have been compelled to pay except for such unlawful act or agreement shall be conclusive proof of damage, mere proof that one has been compelled to pay more for a service than his competitors were paying for the same service, without proof that such excessive payment was due to the alleged wrongful act and agreement complained of, does not constitute the required proof of damage. *Ib.*

14. SAME. *Car service association. Not a trust.*
A car service association, which is merely the agent of different railroads in the enforcement of car service and demurrage charges, and which is not only without power to control the railroads intrusting their business to it, but cannot even fix the demurrage charges which it is its duty to assess, is not an illegal trust or combine, within the prohibition of Laws 1900, p. 125, ch. 88, de-

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TRUSTS AND COMBINES—*Continued.*

fining such trusts as combinations or agreements by which any other persons than the contracting parties and their proper officers or employes shall have the power to conduct the control and management of their business. *Yazoo, etc., R. Co.* v. *Searles*, 520.

15. CODE 1892, § 4437. *Bills of lading. Rules contained in.*

Rules contained in bills of lading, imposing demurrage for dilatory unloading of cars, are binding upon consignees, though they be in fact ignorant of their existence. *Ib.*

16. SAME. *When railroad may refuse service.*

While it is the duty of a railroad to switch and place cars coming from its own line, or tendered to it with proper transfer switching charges by any connecting line, and it cannot excuse itself from the performance of its duty by the existence of disputes as to the correctness of charges withheld pending adjustment, yet it is warranted in refusing to switch and place cars at the warehouse of a consignee who has not only arbitrarily refused to pay demurrage charges accrued in the past, but has expressed his intention of persisting in his refusal even if such charges be justly incurred in the future. *Ib.*

17. SAME. *Rule for collection of demurrage.*

A car service rule requiring prompt payment of demurrage charges and providing that no claim of mistake or overcharge will be considered unless the bill for demurrage is first promptly paid, does not subject consignees to a liability to imposition in the collection of demurrage, but leaves them free to prosecute actions for damages for the collection of overcharges or for refusing to render services when no demurrage is due or payment thereof has not been unduly delayed. *Ib.*

18. SAME. *Assessment of demurrage. Burden of proof.*

In a suit by a consignee for damages for extorting excessive demurrage charges or for withholding car service under a pretended claim for demurrage the burden is on the carrier to prove the proper assessment of unpaid demurrage, and that payment thereof had been refused or unduly delayed, within the terms of a rule requiring the prompt payment of demurrage charges. *Ib.*

19. SAME. *Account for demurrage.*

The fact that a bill for demurrage charges due a railroad was made out by direction of a car service association, to which the railroad intrusted its business in the collection of demurrage, and on its letter heads, does not justify the consignee in refusing to pay such demurrage. *Ib.*

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VENDOR AND VENDEE.

SPECIFIC PERFORMANCE. *Contract. Statute of frauds. Code 1892, § 4225, par. (c). Offer. Acceptance.*

Where an offer to purchase land presents two alternative propositions, a mere acceptance of the offer, without specifying which proposition is accepted, does not create a contract which can be specifically enforced. *Welch* v. *Williams*, 301.

VERDICT.

DAMAGES. *Excessive verdict.*

A judgment on a verdict in excess of the damages proved will be affirmed by the supreme court only on condition of appellees remitting the excess. *Wagner* v. *Ellis*, 422.

VICE PRINCIPAL.

See MASTER AND SERVANT, 4.

WAGES.

CORPORATIONS. *Insolvency. Receiver. Laborers' wages. Preference claims.*

Where a receiver is appointed for an insolvent corporation, whether public or private, and its entire property is placed in his hands, he will be required to pay the wages of laborers who rendered service shortly before his appointment, and whose labor was necessary to continue the business of the corporation and preserve its property, in preference to both ordinary and mortgage creditors. *LeHote* v. *Boyet*, 636.

WARRANTS.

See SCHOOLS, 2, 3.

WARRANTY.

See DEEDS, 7.

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WASTE.

1. CHANCERY PRACTICE. *School lands, sixteenth section.*

A bill in equity to recover for waste committed by defendant on sixteenth section school lands, averring simply that the school authorities had leased the land, that the original lessee had assigned the lease, and that defendant held under it, is demurrable for a failure to show the term of the lease, when, where, by whom and to whom it was made. *Adams* v. *Griffin,* 1.

2. SAME. *Co-tenants. Injunction.*

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3. SAME. *Limitation of injunction.*

Where one tenant in common has enjoined his co-tenant from destroying timber which covers the entire tract and constitutes its chief value, and there is no showing that the timber on one part of the tract is of more value than that on any other part, the injunction should be limited so as to restrain the defendant only from destroying more trees than such proportionate part thereof as corresponds with his interest in the land. *Ib.*

WATERWORKS.

1. MUNICIPALITIES. *Contracts. Water supply. Estoppel. Laws 1886, ch. 325, p. 589. Rescission of contract.*

Where a city, acting under a statute (Laws 1886, ch. 325, p. 589), empowering it to contract alone for pure and wholesome water, contracted with a water company for a supply of such water, it is not estopped to complain:

(*a*) That the specific water furnished by the company after its plant had been put in operation was not pure and wholesome, although, pending the negotiations which led to the contract, the city accepted samples of the water which the company proposed to furnish, and the water furnished was like the samples; nor

(*b*) That the water company used a reservoir from which the city was furnished impure and unwholesome water, although the contract contemplated that the water should be furnished from a reservoir of the kind so used. *Waterworks Co.* v. *Meridian,* 515.

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WATERWORKS — *Continued.*

2. MUNICIPALITIES. *Pure and wholesome water.*

A contract requiring the party contracted with to furnish "pure and wholesome water" certainly required the water to be furnished to be reasonably pure and wholesome, whether it was required to be perfectly pure or not. ***Waterworks Co.*** v. ***Meridian***, 515.

3. SAME. *Fire protection.*

Where a contract to supply a city with water required the party contracted with to furnish first-class fire protection, the fact that the different sizes of pipe that might be used in constructing the plant were mentioned in the contract did not limit the obligation of the party contracted with to furnish first-class fire protection, nor preclude the city from complaining that the pipes actually laid in pursuance of the contract did not afford first-class protection. *Ib.*

4. SAME. *Extensions of plant.*

Where a city had instituted proceedings to cancel a contract with a water company, the former's act in allowing or even in ordering additions and improvements to be made after suit was brought did not estop it from prosecuting the proceedings; but the water company, in making improvements with notice of the pendency of the proceedings, acted as a volunteer. *Ib.*

WILLS.

POWER OF SALE. *Construction. Failure to sell. Estate taken by heirs.*

The provision of a will by which certain lands are or are not to be sold by the executor in his discretion constitutes a disposition thereof, so as to exclude them from other provisions of the same will by which all lands not otherwise disposed of were directed to be sold without reference to the discretion of the executor; and on failure of the executor to sell the first-mentioned lands the heirs took them in fee. *Whitfield* v. *Thompson*, 749.

WITNESSES.

1. CREDIBILITY. *Conviction of crime. Code* 1892, § 1502. *Code* 1892, § 1746.

The examination of a witness touching his conviction of a crime may extend to misdemeanors as well as to felonies, under Code 1892, § 1746, authorizing the examination of any witness as to his conviction of crime, and Code 1892, § 1502, defining "crime" as used in any statute to mean any violation of law liable to punishment by criminal prosecution. *Lewis* v. *State*, 35.

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WITNESSES — *Continued.*

2. CREDIBILITY. *Criminal law. Co-defendants.*

The objection of a defendant upon trial for crime to the competency as a witness of one jointly indicted with him, especially after a *nolle prosequi* has been entered as to the witness, is without merit, since the witness alone can object to being examined. *Lewis* v. *State*, 35.

3. SAME. *Evidence. Witnesses differing.*

Where testimony touching a certain conversation with the accused, unquestionably relating to the deceased, is otherwise competent, it is not rendered inadmissible in evidence because the witnesses fail to corroborate each other in some particulars concerning it. *Fugate* v. *State*, 86.

4. SAME. *Continuance. Absent witness. Compulsory process.*

Under Code 1892, § 1425, regulating the subject, where a defendant in a criminal case had not had opportunity to obtain compulsory process for a witness on account of whose absence he desired a continuance, and the facts which he expected to prove by him were material to the defense, and such process would probably have secured his presence, it was error not to have continued the case, or postponed it to another day, although the prosecuting attorney admitted that the witness, if present, would have testified as shown in the affidavit. *Montgomery* v. *State*, 330.

5. SAME. *Continuance. Absent witness. Admission of what witness will testify.*

Where a witness, on account of whose absence a continuance in a criminal case was asked, was shown by the record to have been duly subpœnaed, and to live a short distance from the courthouse, and to be too sick to attend the trial, and these facts were not contested by the state, and the testimony of the witness was material, the trial should have been postponed until the attendance of the witness could have been procured, although the prosecuting attorney admitted that the witness, if present, would testify as stated in the application. *Caldwell* v. *State*, 383.

6. REJECTION OF FALSE TESTIMONY. *Instruction. Right of jurors.*

An instruction is erroneous which advises the jury that they may reject the entire testimony of a witness who has sworn falsely in any particular, without embodying the limitation that such false swearing must have been done willfully, knowingly, and corruptly. *Sardis, etc., R. Co.* v. *McCoy*, 391.

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WITNESSES — *Continued.*

7. REJECTION OF FALSE TESTIMONY. *Impeachment. Collateral matters. Relevancy.*

The defendant in a murder case and his wife having testified that she did not, after the killing, say to him in the presence of third persons, "If you had listened to me, you would not have gone down there and the man would not have been killed," it was error to allow the state to contradict them, since their testimony on the subject related to a collateral and irrelevant matter. *Davis* v. *State*, 416.

8. INCOMPETENCY. *Harmless error.*

The fact that one witness who testified favorably for the defendant was incompetent affords no ground for setting aside a judgment awarding defendant a certain sum as damages on condemnation of his land for levee purposes, when the judgment is fully sustained by competent evidence. *Levee Commissioners* v. *Yazoo, etc., R. Co.*, 508

9. COMPETENCY. *Conviction of crime. Code* 1892, § 1746.

Under Code 1892, § 1746, authorizing the interrogation of witnesses as to whether they have been convicted of crime, in order to determine their credibility, testimony of a conviction cannot be given by others until the witness has first denied the same. *Cook* v. *State*, 738.

WRIT OF ERROR CORAM NOBIS.

CRIMINAL LAW. *Bias of jurors.*

Where a proper case is made for a writ of error *coram nobis* it will lie in either a criminal or civil case, there being no statute to forbid; but the writ cannot be invoked in a criminal case for the purpose of annulling a final judgment of conviction by showing that one or more of the jurors were prejudiced against defendant and corruptly qualified for the purpose of convicting him. *Fugate* v. *State*, 94.

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